Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

HAROLD CLARKE, et al.,

Petitioners,

vs.

GEORGE WEAVER,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

Submitted by:

DON STENBERG
Attorney General

TERRI M. WEEKS
Assistant Attorney General
Counsel of Record
P.O. Box 98920
Lincoln, Nebraska 68509-8920
(402) 471-2682

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether attorney fees can be awarded against the state on the authority of 42 U.S.C. § 1988, when that statute does not contain an express statutory waiver of the state's immunity and the state is the prevailing party.

2. Whether the attorney's fees provision of the Prison Litigation Reform Act is merely a procedural change and thus applicable to cases pending when the Act was passed.

PARTIES TO THIS ACTION

The parties to this action are petitioners Harold Clarke, John J. Dahm, Douglas Reeves, David Skow, Willem J. Looye, Stephen W. Shutzer, Rob Predmore, Harold Thies, and Donn A. Atkinson; and the respondent George Weaver.

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PETITION FOR WRIT OF CERTIORARI

The petitioners respectfully pray that a writ of *certiorari* issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit in *Weaver v. Clarke,* is reported at 120 F.3d 852 (1997) and is attached hereto as Appendix A (App. 1-7). The opinion of the United States District Court for the District of Nebraska is reported at 933 F. Supp. 831 (D. Neb. 1996) and is attached hereto as Appendix C (App. 9-25). The opinion of the United States District Court for the District of Nebraska granting prison officials' motion for summary judgment on the issue of injunctive relief is not reported, but is attached hereto as Appendix D (App. 26-29). The opinion of the United States Magistrate Judge denying Weaver's motion for a temporary injunction is not reported, but is attached hereto as Appendix E (App. 30-47). The opinion of the United States Magistrate Judge granting prison officials' motion for summary judgment based on qualified immunity is not reported, but is attached hereto as Appendix F (App. 48-62).

JURISDICTION

The judgment of the Eighth Circuit affirming the decision of the United States District Court for the District of Nebraska was entered on July 23, 1997 (Appendix G, App. 63-65). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The text of the Eleventh Amendment to the United States Constitution is set forth in Appendix H (App. 66). The text of the Fourteenth Amendment, section 1 and section 5, to the United States Constitution is set forth in Appendix H (App. 66). The provisions of 42 U.S.C. § 1983, 42 U.S.C § 1988 and 42 U.S.C § 1997(e) are set forth in Appendix H (App. 66-69).

STATEMENT OF THE CASE

George Weaver, an inmate at the Lincoln Correctional Center, filed this action, *pro se* in the federal district court pursuant to 42 U.S.C. § 1983. Weaver alleged that prison officials Harold W. Clarke, John J. Dahm, Douglas Reeves, David Skow, Willem J. Looye, Stephen W. Shutzer, Rob Predmore, Harold Thies, and Donn A. Atkinson (hereinafter "prison officials") violated his rights under the Eighth Amendment by exposing him to environmental tobacco smoke.

Prison officials filed a Motion for Summary Judgment based on qualified immunity which was granted by

United States District Court Judge Richard G. Kopf on November 6, 1995 (Appendix F, App. 48). Prison officials filed a Motion for Summary Judgment on the issue of injunctive relief on March 5, 1996, which was granted by United States District Court Judge Kopf on April 15, 1996 (Appendix D, App. 26).

At the time the district court granted prison officials' Motion for Summary Judgment on the issue of injunctive relief, the court also granted Weaver the opportunity to file an application for attorney's fees. On May 28, 1996, prison officials responded to Weaver's fee application. In that response, prison officials objected to the award of any attorney fees contending that fees were prohibited under the Prison Litigation Reform Act, of 1996, Pub. L. No. 104-134, 110 Stat. 1321 (Apr. 26, 1996) (hereinafter "PLRA" or the "Act") and *Seminole Tribe of Florida v. Florida*, ___ U.S. ___, 116 S. Ct. 114 (1996).

United States District Court Judge Richard G. Kopf granted Weaver an award of attorney's fees on June 18, 1996 (Appendix C, App. 9). It was from this order that prison officials timely filed their appeal to the United States Court of Appeals for the Eighth Circuit. On July 23, 1997, the Court of Appeals issued its opinion, affirming the opinion of the district court (Appendix A, App. 1). The opinion was written by Judge Wollman. Judges Beam and Reasoner[1] joined. (App. 1-7).

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[1] The Honorable Stephen M. Reasoner, Chief Judge, United States District Court for the Eastern District of Arkansas, sitting by designation.

REASONS FOR GRANTING THE WRIT

A. THIS CASE PRESENTS AN IMPORTANT QUESTION LEFT UNRESOLVED BY THE COURT'S DECISIONS IN *HUTTO v. FINNEY, SEMINOLE TRIBE OF FLORIDA v. FLORIDA,* AND *MISSOURI v. JENKINS.*

Prison officials acknowledge that when acting pursuant to section 5 of the Fourteenth Amendment Congress can abrogate Eleventh Amendment immunity without the states' consent. However, the Court requires "an unequivocal expression of congressional intent to overturn the states' immunity in the statute." *Pennhurst State School and Hospital v. Halderman,* 465 U.S. 89 (1984); *Atascadero State Hospital v. Scanlon,* 473 U.S. 234 (1985). 42 U.S.C. § 1988 does not contain an unequivocal expressed intent to abrogate the states' Eleventh Amendment immunity. Therefore this Court's holding in *Hutto v. Finney,* 437 U.S. 678 (1978), wherein the Court held that while not explicitly doing so § 1988 abrogated the states' sovereign immunity, has been overruled *sub silentio* by the Court's opinion in *Seminole Tribe of Florida v. Florida,* ___ U.S. ___, 116 S. Ct. 114 (1996), and attorney fees cannot be awarded against the state in this case.

In its opinion in this case (Appendix A, App. 1-7) the Eighth Circuit rejected this argument based on its reasoning set forth in *Jensen v. Clarke,* 94 F.3d 1191 (8th Cir. 1996). In that opinion, the Eighth Circuit reasoned that such an argument did not prohibit the award of such fees against the state, due to the Court's opinion in *Missouri v. Jenkins,* 491 U.S. 274 (1989). In *Missouri v. Jenkins,* the

Court held that the Eleventh Amendment has no application to an award of attorney fees, ancillary to a grant of prospective relief, against a state. *Missouri v. Jenkins* does not control this case for three reasons.

First, in *Missouri v. Jenkins*, this Court reaffirmed the holding in *Hutto* which specifically stated that a "clear statement" of the waiver of the states' immunity was not needed. This proposition of law has been eroded by subsequent decisions of this Court. It is clear that the current Court requires that even under section 5 of the Fourteenth Amendment, there must be an unequivocal expression of congressional intent to waive the immunity of the state in the statute. Section 1988 has no such waiver. Thus, this part of the holding in *Missouri v. Jenkins* is no longer a correct statement of the law. This case presents the Court with an opportunity to revisit and resolve this conflict.

Secondly, the decision in *Missouri v. Jenkins* stands for the proposition that the Eleventh Amendment did not apply to an award of attorneys fees ancillary to the grant of prospective relief. However, in all of the cases the Court cites to support the grant of attorney fees ancillary to the grant of prospective relief, the fiscal consequences to state treasuries were the necessary results of compliance with decrees which by their terms were prospective in nature. State officials, in order to shape their official conduct to the mandate of the Court's decrees, would have to spend money from the state treasury. Such an ancillary effect on the state treasury is a permissible and often an inevitable consequence of the principle announced in *Ex Parte Young*, 209 U.S. 123 (1908). However it is easy to distinguish this portion of *Missouri v.*

Jenkins from the case now before the Court since no prospective relief was granted by the court at any stage in this litigation. Rather the attorney fees awarded by the court in this case were retroactive fees that compensate Weaver's counsel for his work on the damage issue (directly prohibited by the Eleventh Amendment) as well as his request for injunctive relief, both of which were denied by the lower courts (Appendix A, D, E, F).

Lastly, this Court in *Missouri v. Jenkins* stated that § 1988 fits easily into the longstanding practice of awarding "costs" against states, since the statute imposed the award of attorney's fees "as part of the costs," and thus no waiver of immunity was needed. As support for this finding the Court relied on the opinion in *Hutto* which in turn cited *Fairmont Creamery Co. v. Minnesota*, 275 U.S. 70 (1927). In *Fairmont*, this Court relied on a rule of the Court that was entirely silent on the question of a state's liability for costs based on the "inherent power of the court," a practice that runs afoul of the "clear statement" rule now followed by this Court. The purpose of the clear statement rule is to ensure that Congress has not imposed enormous financial burdens on the state without careful consideration.

As the dissenting Justices in *Hutto* noted, *Edleman v. Jordan*, 415 U.S. 651 (1974), rejected the argument that 42 U.S.C. § 1983 was intended to create a waiver of the states' Eleventh Amendment immunity merely because an action could be brought under that section against state officers rather than against the state itself. Moreover, there was no indication in the language of the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 that Congress sought to overrule that holding.

Therefore, according to the Justices who dissented in *Hutto*, a clear statement making states liable for damages had to be contained on the face of the statute, and could not be based on an interpretation of it's legislative history. As the dissent stated, "we should not permit items of legislative history to substitute for explicit statutory language." 437 U.S. 706. It is the position of the petitioners that with the Court's opinion in *Seminole*, this is now the current state of the law.

42 U.S.C. § 1988 does not contain an unequivocal expressed intent to abrogate the States' Eleventh Amendment immunity. Therefore, attorney fees cannot be awarded against the state as a prevailing party in this case.

B. THE EIGHTH CIRCUIT OPINION DECIDED AN IMPORTANT FEDERAL QUESTION THAT CONFLICTS WITH *LANDGRAF v. USI FILM PRODUCTS* AND *BRADLEY v. RICHMOND SCHOOL BOARD*.

On April 26, 1996, the PLRA was signed into law. Among other things the PLRA amended 42 U.S.C. § 1997(e). The amendments set forth in 42 U.S.C. § 1997(e) are purely procedural in nature and as such they are presumed to have retroactive application. *Landgraf v. USI Film Products*, ___ U.S. ___, 114 S. Ct. 1483 (1994); *cf.*, *Bradley v. Richmond School Board*, 416 U.S. 696 (1974). Thus, the Eighth Circuit's opinion in this case is in conflict with this Court's holdings in *Landgraf* and *Bradley*.

In *Landgraf*, this Court stated that where the statute does not contain an express effective date, courts must

determine three things when it is evaluating the retroactive application of the statute: whether the requirements impair previously held rights; whether there is increased liability for past conduct; and whether there are any new duties imposed with respect to transactions already completed. Utilizing the *Landgraf* test, it is clear that the attorney's fees provision of the PLRA, found in 42 U.S.C. § 1997(e) should be applied to all cases pending when the Act was passed.

(1) Whether the requirements of the PLRA impair previously held rights

Prior to the enactment of the attorney's fees provisions of the PLRA, the award of attorney fees was discretionary, and thus the court had considerable latitude in fee awards. In fact, the district courts were not required to award fees at all. Thus, an award of attorney's fees to Weaver was by no means certain in this case.

The provisions of 42 U.S.C. § 1997(e) limits the awards of attorney fees in that it narrows the definition of a prevailing party so that a prisoner's attorney will be reimbursed only for those fees reasonably and directly incurred in proving an actual violation of a federal right. Narrowing the definition of "prevailing party" eliminates attorney fees that penalize voluntary improvements in prison conditions pending the litigation. The PLRA therefore, abolishes the catalyst theory established in *Hewitt v. Helms*, 482 U.S. 755 (1987).

The catalyst theory however, as it pertained to voluntary improvements in prison conditions, had already been abolished by this Court in *Farmer v. Brennan*, ___

U.S. ___, 114 S. Ct. 1970 (1994). In *Farmer v. Brennan*, this Court stated that the decision to grant injunctive relief should be determined in light of the prison authorities' current attitudes and conduct. 114 S. Ct. at 1983. Thus, courts are to look at the prison officials' current attitudes and conduct at the time suit is brought and persisting thereafter, in determining whether injunctive relief is appropriate. Under *Farmer* injunctive relief will not be entered if prison officials, during the litigation, establish that the conditions of which the inmate complained had voluntarily been remedied. Utilizing this reasoning, it follows that not only is injunctive relief prohibited, but also an award of attorney fees where the court determines voluntary improvements were made during the litigation. If prison officials cannot be subjected to injunctive relief due to voluntary improvements in conditions during the pendency of the litigation, it follows that they cannot be penalized with an award of fees.

Therefore, the PLRA attorney's fees provisions did no more that codify the Court's theory of liability announced in *Farmer*. Since Weaver had no right to fees, the application of the PLRA to his case did not impair any previously held right. Thus, this first factor supports retroactive application of this procedural rule.

(2) There is no increased liability for past conduct

It is important, when engaging in the retroactivity analysis, to recognize the distinction that *Landgraf* makes between primary and secondary conduct. Primary conduct is the conduct that gives rise to the suit, whereas secondary conduct is conduct that occurs in the course of

the litigation. *Landgraf*, 511 U.S. at 277. Secondary conduct is "collateral to the main cause of action and uniquely separable from the cause of action to be proved at trial." *Id.* Legislation has true retroactive effect only when it changes the consequences for primary conduct.

Moreover, this Court has already declared in *Bradley v. Richmond School Board*, 416 U.S. 696 (1974), and restated in *Landgraf*, that attorney's fees determinations are collateral to the main cause of action and uniquely separable from the cause of action to be proved at trial. The Court reasoned in *Bradley* that the statute was available to sustain the award of fees because it "merely serves to create an additional basis or source for the board's potential obligation to pay attorney's fees. It does not impose an additional or unforeseeable obligation upon it." *Id.* The reasoning of *Bradley* is equally applicable to the case at bar.

The PLRA attorneys' fee provisions merely serve to reduce a party's potential obligation to pay attorney's fees. It does not impose an additional or unforeseen obligation upon either party. In the case now before the Court, Weaver's expectations about attorney's fees procedures are not the type of expectations protected under *Landgraf* because they relate to secondary, not primary conduct. Therefore, the second factor of the *Landgraf* test also supports retroactive application of the attorney's fees provisions of the PLRA to cases pending when the Act was passed.

(3) There are no new duties imposed with respect to transactions already completed

Weaver has absolutely no new duties with respect to the provisions of the PLRA with regard to attorney's fees. It is clear that the reasoning of *Landgraf* supports the retroactive application of procedural provisions of the PLRA regarding attorney's fees.

Other procedural aspects of the PLRA have been applied retroactively. *Green v. Nottingham*, 90 F.3d 415 (10th Cir. 1996) (holding that § 1915(g) does not run afoul of *Landgraf* because it is a "procedural rule"); *Abdul-Wadood v. Nathan*, 91 F.3d 1023 (7th Cir. 1996) (all § 1915 has ever done is excuse prepayment of docket fees; a litigant remains liable for them, and for other costs, although poverty may make collection impossible); *Covino v. Reopel*, 89 F.3d 105 (2nd Cir. 1996) (holding the rationales outlined in *Landgraf* strongly indicate that the fee payment obligations of the PLRA should be applied to appeals in which the notice of appeal was filed before the Act's effective dates. The fee payment obligations are essentially procedural, and they are far less burdensome than the attorney's fee obligations applied to pending litigation in *Bradley*); *Adepegba v. Hammons*, 103 F.3d 383 (5th Cir. 1996) (holding that § 1915(g) is a procedural statute governing the process by which indigent individuals, including prisoners, bring civil actions or appeals in the federal courts. Therefore, the court found that application of this procedural rule to pending appeals did not raise the retroactivity concerns discussed in *Landgraf*).

The PLRA attorney's fees provision, like the provisions at issue in *Bradley*, affects the propriety of the

attorney's fee award. A departure from existing case law involving the retroactivity of procedural provisions, such as attorney fees, cannot be justified merely because the Act limits, as opposed to expands, the award of attorney fees. Rather, precedent dictates the application of the PLRA's attorney's fees provision to all cases pending when the Act was passed.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,

DON STENBERG
Attorney General

TERRI M. WEEKS
Assistant Attorney General
Counsel of Record
P.O. Box 98920
Lincoln, Nebraska 68509-8920
(402) 471-2682

October 7, 1997

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 96-2952

George L. Weaver,

Plaintiff/Appellee,

v.

Harold W. Clarke, Director, Correctional Services, Lincoln Correctional Center; John J. Dahm, Warden, Chief Executive Officer, Lincoln Correctional Center; Douglas L. Reeves; David Skow; Robby G. Predmore; Willem Looye,

Defendants/Appellants,

Roger O. Doerr,

Defendant,

Stephen W. Shutzer; Donald Earl Atkinson; Harold F. Thies, Jr.,

Defendants/Appellants.

Appeals from the United States District Court for the District of Nebraska.

No. 96-3008

George L. WEAVER,

Plaintiff/Appellant,

v.

Harold W. CLARKE, Director, Correctional Services, Lincoln Correctional Center; John J. Dahm, Warden, Chief Executive Officer, Lincoln Correctional Center; Douglas L. Reeves; David Skow; Robby G. Predmore; Willem Looye,

Defendants-Appellees,

Roger O. Doerr,

Defendant,

Stephen W. Shutzer; Donald Earl Atkinson; Harold F. Thies, Jr.,

Defendants/Appellees.

Submitted: March 13, 1997

Filed: July 23, 1997

Before WOLLMAN and BEAM, Circuit Judges, and REASONER,[1] District Judge.

WOLLMAN, Circuit Judge.

The defendants, employees of the Nebraska Department of Correctional Services, appeal from the district court's[2] judgment awarding attorney's fees and costs in the amount of $11,299.17 to George L. Weaver in Weaver's suit for damages and injunctive relief brought under 42 U.S.C. § 1983. Weaver cross-appeals. We affirm.

Weaver's suit was based upon his allegations that the defendants had violated his rights under the Eighth Amendment by causing him to be exposed to environmental tobacco smoke. Following our affirmance of the district court's denial of the defendants' motion to dismiss for failure to state a claim and on the basis of qualified immunity, *see Weaver v. Clarke*, 45 F.3d 1253 (8th Cir.1995), the district court granted the defendants' motion for summary judgment on the ground that Weaver had failed to establish a claim of deliberate indifference to his serious medical needs.

Weaver's motion for a preliminary injunction was referred to a United States Magistrate Judge,[3] who found that although Weaver had demonstrated a likelihood of

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[1] The HONORABLE STEPHEN M. REASONER, Chief Judge, United States District Court for the Eastern District of Arkansas, sitting by designation.

[2] The Honorable Richard G. Kopf, United States District Judge for the District of Nebraska.

[3] The Honorable David L. Piester, United States Magistrate Judge for the District of Nebraska.

success on the merits, he had not established that he would suffer irreparable harm during the pendency of the action. Accordingly, on January 29, 1996, the magistrate judge entered a memorandum and order recommending that the motion for preliminary injunction be denied. The order set an evidentiary hearing on the request for a permanent injunction for May 15, 1996, and established a discovery deadline and a pretrial conference.

On February 12, 1996, defendant Clarke, in his capacity as director of the Department of Correctional Services, imposed a smoking ban, effective March 18, 1996, in all buildings owned or operated by the Department. In announcing the ban, Clarke stated that "pending inmate litigation, both locally and nationally on the issue of second hand smoke are concerns that must be addressed."

In light of Director Clarke's ban on smoking, the district court found that Weaver had attained all the prospective relief he had sought and therefore granted summary judgment in favor of the defendants, withholding entry of judgment pending a ruling on Weaver's application for attorney fees. Weaver then filed an application requesting fees in the amount of $17,595.00 and expenses in the amount of $4,722.59. After finding that Weaver was a prevailing party, the district court awarded fees in the amount of $8,346.35 and expenses in the amount of $2,952.82.

The defendants challenge the district court's fee award on three grounds. First, they contend that *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 114 (1996), overruled

sub silentio the holding in *Hutto v. Finney*, 437 U.S. 678 (1978), that 42 U.S.C. § 1988 abrogates the states' Eleventh Amendment immunity. We rejected the very same argument in a decision filed some two weeks prior to the submission of the defendants' brief in this case. *See Jensen v. Clarke*, 94 F.3d 1191, 1201-02 (8th Cir.1996).

The defendants next argue that 42 U.S.C. § 1997(e), part of the Prison Litigation Reform Act, prohibits an award of fees in this case. Again, we rejected this same argument in *Jensen v. Clarke*, 94 F.3d at 1202-03, holding that section 1997(e) as amended was not intended to be given retroactive application.

The defendants' final argument is that Weaver is not a prevailing party within the meaning of section 1988 because Director Clarke's March 1996 smoking ban was not implemented as a result of Weaver's lawsuit but was in fact the culmination of policies and proposals that Clarke had announced prior to the filing of Weaver's complaint. Citing *Hendrickson v. Branstad*, 934 F.2d 158 (8th Cir.1991), the district court found that Weaver's lawsuit was a necessary and important factor in achieving the smoking ban and that the implementation of the ban was not gratuitous or voluntary. In light of Director Clarke's statement at the time he announced the ban that pending inmate litigation, both local and national, regarding the issue of second-hand smoke raised concerns that needed to be addressed, and given the temporal proximity between the magistrate judge's order setting an evidentiary hearing and Clarke's announcement of the smoking ban, we conclude that the district

court did not err in finding that Weaver was a prevailing party.[4]

Cross-Appeal

Weaver has cross-appealed, contending that the district court erred in finding that the defendants had not been deliberately indifferent to Weaver's serious medical needs. Our review of the record persuades us otherwise, however, for the defendants took action to house Weaver in a smoke-free cell and thereafter took reasonable steps to insure that Weaver's cellmate observed the no-smoking rule by issuing a misconduct report, by searching the cell for tobacco products, and by advising Weaver that he should contact the managers of the housing unit for an investigation, a course of action that Weaver did not avail himself of. Thus, Weaver has failed to establish a claim of deliberate indifference as that term has been defined by *Farmer v. Brennan*, 511 U.S. 825 (1994), and *Estelle v. Gamble*, 429 U.S. 97 (1976). *See also Logan v. Clarke*, No. 97-1314, slip op. (8th Cir. July 10, 1997); *Weaver v. Clarke*, 45 F.3d at 1255.

Weaver contends that the district court erred in disallowing a portion of the amounts claimed for attorney fees and expenses because of his noncompliance with Rule 83.14 of the Local Rules for the District of Nebraska,

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[4] The defendants' attack upon the amount of the award of fees and expenses is without merit, all the more so in light of the substantial reduction made by the district court in response to the defendants' objections to the fee application.

which specifies the particularity with which a fee application must identify the services and expenses for which compensation is sought. Having reviewed the defendants' objections to Weaver's fee application, we cannot say that the district court abused its discretion in reducing the number of allowable hours for services rendered and the amount of the expenses claimed.

The judgment is affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

GEORGE L. WEAVER, Plaintiff, vs. HAROLD CLARKE, et al., Defendants.	)	4:CV93-3356 **JUDGMENT** (Filed Jun. 18, 1996)

Based upon this court's prior rulings that: (1) the defendants have qualified immunity regarding damages; (2) the defendants have rectified the Eighth Amendment violation alleged by the plaintiff and (3) the plaintiff is a prevailing party for purposes of awarding attorney fees,

JUDGMENT is entered: (1) for Defendants and against Plaintiff dismissing Plaintiff's complaint; and (2) for Plaintiff and against Defendants providing that the plaintiff (for the benefit of his lawyer) is awarded an attorney's fee in the amount of $8,346.35 and expenses in the amount of $2,952.82 for a total award of $11,299.17 and judgment is entered against Defendants for said sum.

DATED this 18th RGK day of June, 1996.

BY THE COURT:

/s/ Richard G. Kopf
Richard G. Kopf
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

GEORGE L. WEAVER, Plaintiff, vs. HAROLD CLARKE, et al., Defendants.	)	4:CV93-3356 **MEMORANDUM AND ORDER** (Filed June 18, 1996)

Pending before the court is Plaintiff's application for attorney's fees (filing 111). I will grant Plaintiff's motion although I will adjust the award amount based on objections to the application by the defendants. I shall make a total award of $11,299.17.

Factual and Procedural Background

Plaintiff is a non-smoking inmate incarcerated in the Lincoln Correctional Center (LCC). Plaintiff sued the defendants pursuant to 42 U.S.C. 1983 alleging they have been deliberately indifferent to the serious health risks non-smokers face from the continuous exposure to environmental tobacco smoke (ETS). Even though the defendants eventually placed Plaintiff in a non-smoking cell, Plaintiff alleges his health problems persist since he continues to be exposed to ETS drifting out of adjacent smoking cells which permeates the housing unit. Plaintiff specifically alleged the exposure to ETS has caused headaches, dizziness and nausea.

Plaintiff's complaint sought monetary damages and injunctive relief. Plaintiff's claims for monetary damages

were dismissed when Defendants prevailed on their motion for summary judgment based on qualified immunity. (Filing 65). Plaintiff sought preliminary injunctive relief in the form of an order enjoining the defendants from exposing him to an environment "permeated" with ETS until his claims could be decided on the merits. (Filing 61). While Magistrate Judge Piester recommended that Plaintiff's motion for preliminary injunctive relief be denied because of a lack of irreparable injury (filing 90) the magistrate judge did order an expedited evidentiary hearing be scheduled on Plaintiff's request for permanent injunctive relief (filing 90).

During the course of the January 18 and 19, 1996 hearing on Plaintiff's motion for preliminary injunctive relief, Magistrate Judge Piester heard evidence which, from that time forward, gave Defendants actual knowledge of a substantial risk of serious harm to Plaintiff. From the time Plaintiff filed his complaint in 1993 until the date of the preliminary injunction hearing, Defendants have argued that they had no actual knowledge that the conditions of Plaintiff's confinement subjected him to any risk of serious harm (filing 90, p. 9).

Judge Piester specifically concluded that the evidence presented during the hearing on Plaintiff's motion for preliminary injunction was sufficient to support a finding that the risk to Plaintiff of the present levels of ETS, over time, constituted a substantial risk of serious harm to Plaintiff's health. Judge Piester wrote that once the court concluded that such risk was substantial, *Farmer v. Brennan*, 114 S.Ct. 1970 (1994) required the defendants to take reasonable precautions to avoid the risk. *Id.* Judge Piester remarked that any lesser response would amount to

obduracy, and it is obdurate conduct which violates the Eighth Amendment. Most significantly, Judge Piester concluded Plaintiff had demonstrated a likelihood of success on the merits of his claim for permanent injunctive relief (filing 90, p. 10).

In adopting Judge Piester's recommendation that the motion for preliminary injunction be denied I adopted only his findings as they pertained to Plaintiff's failure to prove he faced irreparable harm before an expedited decision on the merits could be made (filing 93). I did not specifically adopt Judge Piester's findings that Defendants now had actual knowledge that their continued conduct in exposing Plaintiff to ETS would amount to an Eighth Amendment violation. It is interesting to note, however, that the defendants did not make any objections to any of the findings in the magistrate's prior ruling.

On February 12, 1996, 14 days after Judge Piester's ruling, Defendant Harold Clarke, in his capacity as director of the Department of Correctional Services (DCS), imposed a smoking ban in all DCS owned and/or operated buildings. The ban took effect March 18, 1996. (Filing 96, Ex. 17). Harold Clarke stated when he announced the ban that "pending inmate litigation, both locally and nationally on the issue of second hand smoke are concerns that must be addressed." (Filing 96, Ex. 17). The expedited evidentiary hearing on the merits of Plaintiff's claim had been scheduled for May 15, 1996.

With the adoption of the smoking ban, I concluded Defendants were entitled to summary judgment on the merits of Plaintiff's claim because Defendants had rectified any Eighth Amendment violations (filing 108). At

the time I granted Defendants' motion for summary judgment I invited the parties to address whether Plaintiff may still be a prevailing party for purposes of an attorney's fee award. The parties have briefed the question and Plaintiff has submitted a fee application (filing 111). I will first address Defendants' arguments that Plaintiff is not entitled to a fee award.

Defendants' Arguments Opposing Fee Award

Defendants first argue that the United States Supreme Court's recent opinion in *Seminole Tribe of Florida v. Florida*, ___ U.S. ___, 116 S.Ct. 1114 (1996) precludes an award of fees since 42 U.S.C. § 1988, the attorney's fee statute, does not contain an explicit waiver of the State of Nebraska's Eleventh Amendment immunity. (Def's Brief at 4).

I have concluded *Seminole Tribe* is not applicable to this case for the reason that the immunity question in *Seminole Tribe* arose in the context of the Indian Commerce Clause whereas the fee issue presented in this case arises under civil rights statutes made applicable to the states by virtue of the Fourteenth Amendment. It is undisputed that Congress has the authority to abrogate states' immunity under the Fourteenth amendment. *Id.* at 1131, n. 15. And the Supreme Court has specifically held that Congress properly used this power under the Fourteenth Amendment when it enacted the Civil Rights Attorney's Fee Awards Act of 1976. *Hutto v. Finney*, 437 U.S. 679, 693-94 (1978) (Congress utilized its power under the Fourteenth Amendment when it enacted the Civil Rights Attorney's Fees Awards Act of 1976 and thus the

Eleventh Amendment was no bar to a fee award against a state public official).

Defendants next argue that the recently enacted Prison Litigation Reform Act, Pub. L. No. 104-134, 110 Stat. 1321 (April 26, 1996) (hereafter PLRA) narrows the definition of a prevailing party so that a prisoner's attorney will be compensated only for those fees reasonably and directly incurred in proving an actual violation of a federal right. Although the defendants' argument is general, it appears that the defendants rely upon Section 803(d) of the Act, amending 42 U.S.C. § 1997e(d)(A) to provide, among other things, that no fees shall be awarded unless "directly and reasonably incurred in proving an actual violation of the plaintiff's rights. . . . ". The defendants argue this portion of the PLRA abolishes the catalyst theory upon which attorney's fees may be awarded. *See Hewitt v. Helms*, 482 U.S. 755 (1987); *Maher v. Gagne*, 448 U.S. 122 (1980).

Initially I do not believe the portion of PLRA upon which the defendants rely should be applied retroactively. In this case all of the action that triggered entitlement to an attorney's fee award took place prior to the date of enactment of the PLRA. Still further the portion of the PLRA upon which defendants rely has no stated effective date as compared with section 802 of the Act. Accordingly, since all the events that triggered entitlement to attorney's fees took place prior to the date of enactment of the PLRA and since Congress has not specified an effective date, retroactive imposition of the section of the PLRA upon which defendants rely would cause "manifest injustice" to lawyers like Plaintiff's counsel who have performed their ethical obligations to the

courts upon settled expectations premised upon precedent that if they "prevailed" they would be compensated. Therefore, I need not apply the Act retroactively. *Bradley v. Richmond School Board*, 416 U.S. 696, 711-21 (1974) (In deciding whether to apply change in law regarding attorney fees to a case that had not yet become final regarding fees earned prior to date of enactment Court examined whether Congress provided clear directive and whether imposition of the change would work "manifest injustice".)

Moreover, even if I applied the PLRA, I must presume Judge Piester was correct in his conclusion that a failure to remedy the smoking situation would result in an Eighth Amendment violation. Defendants never challenged that finding. They do not challenge that finding now. If Judge Piester's judicial declaration was correct, and I must presume it to be, then certainly the section of the PLRA upon which defendants rely is satisfied as Plaintiff presented sufficient evidence at the hearing on the preliminary injunction to persuade Judge Piester that a violation of Plaintiff's rights would occur each and every day after the judicial declaration until and unless the situation was remedied.

Thus, at the very least Plaintiff established a presumptive violation of the Eighth Amendment for the period of time between the date of Judge Piester's judicial declaration (January 29, 1996) and the date (February 12, 1996) Defendants effectively changed the smoking policy. Clearly the implementation of the smoking ban came about as a result of the order which put Defendants on notice that continuance of their past practice was obdurate. Consequently, I find that the requested attorney's

fee was directly and reasonably incurred in proving an actual violation of the plaintiff's rights, and therefore the section of the PLRA that the defendants rely upon is satisfied in this case (assuming the PLRA otherwise applies).

Fee Application

Section 1988 of Title 42 of the United States Code provides for an award of attorney's fees to prevailing parties in litigation such as that before the court. In 1983, attorney-fee disputes were consuming substantial judicial resources. Accordingly, the United States Supreme Court issued its seminal opinion in *Hensley v. Eckerhart*, 461 U.S. 424 (1983), stating that "[t]he standards set forth in this opinion are generally applicable in all cases in which Congress has authorized an award of fees to a 'prevailing party.' " *Id.* at 433 n.7. In *Hensley*, the Court specifically warned lower courts not to permit fee requests to spawn "a second major litigation." *Id.* at 437. Following the Supreme Court's opinion in *Hensley*, the Federal Judicial Center published a comprehensive examination of the issue of attorney fees. Alan Hirsch & Diane Sheehey, *Awarding Attorneys' Fees and Managing Fee Litigation* (Federal Judicial Center 1994) [hereinafter *"Awarding Attorneys' Fees"*].

Having carefully considered *Hensley*, the precedents which followed it, and *Awarding Attorneys' Fees*, I shall now endeavor to address the specific issues presented by this fee application.

1.

The first issue to be considered in any attorney fee case is whether an award of any kind is in order. An award is appropriate in this case because: (1) the lawsuit was a "necessary and important" factor in achieving the smoking ban and (2) the implementation of the smoking ban was not "gratuitous or voluntary". *Hendrickson v. Brandstad*, 934 F.2d 158, 161 (8th Cir. 1991). That this suit was "necessary and important" to the smoking ban and that the smoking ban was not "gratuitous or voluntary" was admitted when the ban was announced. Harold Clarke, one of the defendants, stated when he announced the ban that "pending inmate litigation, both locally and nationally on the issue of second hand smoke are concerns that must be addressed." (Filing 96, Ex. 17).

Plaintiff's application for attorney's fees is timely, and Plaintiff is the "prevailing" party as that term has been understood. *Maher v. Gagne*, 448 U.S. at 129 (A party may be a "prevailing party" when the suit has vindicated constitutional rights even " 'without formally obtaining relief.' ") (citation omitted). The smoking ban was the relief Plaintiff sought in his quest for injunctive relief. *See Texas Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 791-92 (1989). Moreover, there are no special circumstances which would justify this court's refusal to award attorney fees. *See e.g., Blanchard v. Bergeron*, 489 U.S. 87, 89 n.1 (1989) (quoting *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968)).

2.

What constitutes attorney fees is not always evident. While it is clear that fees for lawyers are included in such an award, it is not obvious that the fees of others are also included.

The Supreme Court has decided that fees for paralegal and lawclerk [sic] work should be allowed at the rates billed to clients for such services if that is the practice in the relevant market. *Missouri v. Jenkins*, 491 U.S. 274, 285, 287-88 & n.9 (1989). Thus, any component of an attorney-fee award should also include an amount equivalent to what the law firms would customarily bill clients for the work of paralegals and law clerks, provided, of course, that it is the practice in the relevant market to bill such services to clients.

I have previously concluded it is the practice in Lincoln, Nebraska to bill clients for the work of paralegals and law clerks. Indeed, that is the practice in most urban areas in the State of Nebraska. *See, e.g., Lutheran Medical Ctr. v. Contractors, Laborers, Teamsters & Engineers Health & Welfare Plan*, 814 F. Supp. 799, 805 n.5 (D. Neb. 1993), *aff'd*, 25 F.3d 616 (8th Cir. 1994) (stating "[t]he rates for the law firm's nonprofessional employees, including paralegals, librarians, and law clerks, were between $60-$65 an hour. These are customary charges in the relevant economic market."). *See also, Tabech v. Gunter*, 869 F.Supp. 1446, 1455 (D.Neb. 1994).

The same principle applies to out-of-pocket expenses; that is, if an out-of-pocket expense is normally billed to fee-paying clients in the relevant economic market, then such expenses are a proper component of an attorney-fee

award. *Awarding Attorneys' Fees* at 18-19 & n.83. The evidence in this case establishes that the expenses claimed are the type customarily billed to fee-paying clients in the relevant economic market. (Filing 111, Exhibits B and C).

3.

The Supreme Court established in *Hensley* that the award in fee-shifting cases is based upon the so-called "lodestar." 461 U.S. at 433. The lodestar is calculated by determining the number of hours reasonably expended, multiplied by the applicable hourly *market* rate for the relevant legal services.[1] *Id.*

The reasonable rate is determined by reference to the marketplace. *Missouri v. Jenkins*, 491 U.S. 274, 285 (1989) ("[W]e have consistently looked to the marketplace as our guide to what is 'reasonable.' "). As the Court also noted, the marketplace takes into account variations in the skill

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[1] While many courts continue to use the so-called "*Johnson* factors" (as this court does from time to time), "*Hensley* makes clear that these factors matter only as they bear on the market rate or hours reasonably expended, or, in rare cases, if they are a basis for adjusting the lodestar." *Awarding Attorneys' Fees* at 19 n.84. I have considered each and every "*Johnson*" factor in arriving at my decision. Those factors are: (1) time and labor required; (2) novelty and difficulty of issues; (3) skill required; (4) loss of other employment; (5) customary fee; (6) whether fee is fixed or contingent; (7) time limitations imposed by client or circumstances; (8) amount involved and results obtained; (9) counsel's experience, reputation, and ability; (10) undesirability of case; (11) nature and length of relationship with clients; and (12) awards in similar cases. *Johnson v. Georgia Highway Express*, 488 F.2d 714, 717 (5th Cir. 1974).

and experience of attorneys. *Blum v. Stenson*, 465 U.S. 886, 895-96 n.11 (1984).

With respect to hours reasonably expended, that is ultimately a judgment for the court. The issue, however, "is not whether hindsight vindicates an attorney's time expenditures, but whether at the time the work was performed, a reasonable attorney would have engaged in similar time expenditures." *Awarding Attorneys' Fees* at 24-25 n.116 (quoting *Grant v. Martinez*, 973 F.2d 96, 99 (2nd Cir. 1992), *cert. denied*, 113 S. Ct. 978 (1993)).

The Supreme Court made it clear that counsel are required to exercise billing judgment and that district courts are required to exclude from initial fee calculations hours that were not reasonably expended, including excessive, redundant, or otherwise unnecessary work. *Hensley*, 461 U.S. at 434.

The documentation required to support a fee application varies from circuit to circuit. *Awarding Attorneys' Fees* at 25. In the Eighth Circuit, determining the adequacy of the records is largely left to the discretion of the trial court. *Awarding Attorneys' Fees* at 26 n.125 (citing *MacDissi v. Valmont Indus.*, 856 F.2d 1054, 1061 (8th Cir. 1988)).

When calculating the lodestar, it is important to recognize that a number of things are subsumed within it. As a general rule, reductions for insufficient documentation and the like are to be included in the calculation of the lodestar. *Awarding Attorneys' Fees* at 35. Moreover, in the Eighth Circuit, the novelty or difficulty of the case should be included when calculating the lodestar rather than used as an enhancement. *Awarding Attorneys' Fees* at

36 (citing *Hendrickson v. Branstad*, 934 F.2d 158, 163 (8th Cir. 1991)).

Finally, the Supreme Court has stated that a trial court may in its discretion compensate the award recipient for a delay in payment. This can be achieved by calculating the lodestar in current dollars, which is my practice. *See, e.g., Missouri v. Jenkins*, 491 U.S. at 284.

4.

I turn now to the calculation of the lodestar.

a.

I shall first examine what is a reasonable hourly rate when viewed at current market rates. As I have noted before, "this court customarily approves hourly rates ranging from $85-105 per hour" in civil rights cases. *Lutheran Medical Ctr.*, 814 F.Supp. at 805. I believe that range is applicable in this case and is an accurate reflection of what the market charges in and around Lincoln, Nebraska for civil rights litigation of the type involved here.

I will apply the high end of the market range to legal services rendered by Mr. Monbouquette as I believe I have the discretion to use the high end of the market range. *Awarding Attorneys' Fees* at 21 n. 92 (citing *Shakopee Mdewankton Sioux Comm. v. City of Prior Lake*, 771 F.2d 1153 (8th Cir. 1985), *cert. denied*, 475 U.S. 1011 (1986)).

As noted earlier, the so-called *Johnson* factors are subsumed in the lodestar calculation. *Awarding Attorneys' Fees* at 19 n.84. This is nothing more than a recognition

that normally the rates lawyers currently charge fee-paying clients are a good guide to what those same lawyers should be paid by virtue of an attorney-fee award. *Id.* at 20-21 ("Courts all agree that an attorney's customary billing rate is the proper starting point for calculating fees."). Nevertheless, three so-called *Johnson* factors should be highlighted, although all such factors have been considered.

It is useful to consider counsel's experience, reputation, and ability. Mr. Monbouquette graduated from law school in 1973. After three years as a government agency staff attorney he began practicing law in Massachusetts from 1977 through 1988. After moving to Omaha, Nebraska in December 1988 he practiced in small firms in Omaha through May, 1993. Mr. Monbouquette also served as a Deputy Douglas County Attorney for one year, where he was charged with defending civil rights cases relating to the conditions of confinement of county prisoners. Mr. Monbouquette has returned to private practice and at this time practices primarily in the areas of employment, discrimination and wrongful termination matters. (Filing 111, Exhibit A, ¶ 4).

I also note an affidavit filed by Thomas F. Dowd, an "av" rated labor lawyer in Omaha, Nebraska with 30 years experience, much of it federal court litigation. Mr. Dowd states during Mr. Monbouquette's association with his firm Mr. Monbouquette was awarded an attorney's fee of $120.00 per hour for his work on an employment discrimination case in federal court in Omaha, Nebraska in which their client prevailed. Mr. Dowd states a fee in this case of $125.00 per hour for a lawyer with Mr. Monbouquette's experience would be reasonable for both in-

court and out-of-court time. (Filing 111, Exhibit D, ¶ 1). Mr. Dowd has practiced in this court and has been awarded an attorney's fee of $160.00 per hour following a one-day jury trial in an age discrimination case. *See Stokes v. City of Omaha*, CV89-0-664.

I also believe it helpful to recognize the nature and length of counsel's relationship with the client in this case. Mr. Monbouquette was appointed by the court to represent Plaintiff on November 22, 1993. This case culminated in the implementation of the smoking ban on February 12, 1996. The court appreciates Mr. Monbouquette's willingness to see this litigation through to the end, especially in view of the fact he is a solo practitioner. (Plf's Brief at 5).

I would also like to note that I am satisfied that this case was sufficiently difficult to warrant the lodestar rate used. Mr. Monbouquette was not only an advocate in this court but he was called upon to demonstrate appellate advocacy skills when the defendants appealed an order of this court. This court appreciates the difficulties which are associated with keeping two balls in the air at once.

b.

Plaintiff seeks an attorney's fee award in the total amount of $22,317.59. This reflects an expenditure of 128.50 hours at $130.00 per hour by Mr. Monbouquette; and expenditure of 22.25 hours by Mr. Monbouquette's law clerk at an hourly rate of $40.00 per hour;[2] and costs

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[2] The $40.00 rate for law clerks is substantially lower than the $60-65 rate previously approved in *Lutheran Medical Ctr.* as

and expenses in the amount of $4,722.59. As I have previously indicated I will award Plaintiff fees based on an hourly rate of $105.00 rather than at a rate of $130.00 per hour.

I am persuaded over the course of nearly three years Plaintiff's counsel could have easily expended 128.50 hours on this case. Nevertheless, I will reduce the amount of hours expended by Mr. Monbouquette by 56.63 hours and I will reduce the hours spent by his law clerk by 2.25 hours. I have reduced the amount of allowable hours as I am persuaded that many of the objections premised on noncompliance with NELR 83.14 made by Defendants to specific entries on the fee application have sufficient merit to warrant such a reduction. Therefore, I find the total hours allowed for Mr. Monbouquette to be 71.87. I find the total hours allowed for his law clerk to be 20.00.

c.

Plaintiff has also submitted an application for reimbursement for expenses incurred during this litigation. Plaintiff seeks an award in the amount of $4,722.59. Defendants have again objected to the great bulk of the expense request for the reason the application is not specific enough to put them on notice as to what was involved in a particular expense item, and for this reason the request does not specifically comply with NELR 83.14. I agree with defendants that the lack of specificity

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the customary rate in the marketplace. Furthermore, the defendants have not specifically objected to the $40.00 rate or the inclusion of law clerk time in the fee application.

on many of the expense entries precludes an award to the extent Plaintiff seeks, but I will award Plaintiff $2,952.82 in expenses.

I note Plaintiff seeks a lump sum award in the amount of $3,454.04 for expenses related to the testimony [sic] a medical expert during the preliminary injunction hearing in January 1996. I have disallowed $1,554.04 of this amount for the reason the request does not comply with the local rules. I note, however, that $1,900.00 from the Federal Practice Fund was previously allocated to Plaintiff to pay expert and travel fees related to the expert's appearance at the January 1996 hearing (filings 79 and 80). As the court previously approved this expenditure, and as the court file is sufficiently clear about the application of this amount, I will allow $1,900.00 of the $3,454.04 amount attributable to the use of a medical expert.[3]

d.

I will not reduce Plaintiff's fee award based on what Defendants argue is Plaintiff's limited success. If Judge Piester was correct in his analysis that an Eighth Amendment violation was occurring, the defendants' implementation of the total smoking ban 12 days after the January 29, 1996 order was the primary relief Plaintiff sought all along. That the defendants are entitled to qualified immunity from damages does not detract from the results Plaintiff's lawsuit achieved.

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[3] Plaintiff is reminded the Federal Practice Fund must be reimbursed out of the fee award to the extent of all advances received from the Fund.

5.

I have therefore determined to grant Plaintiff's fee application in part and will award the plaintiff (for the benefit of his lawyer) an attorney's fee in the amount of $8,346.35, which represents the sum of 71.87 hours at $105.00 per hour and 20 hours at $40.00 per hour. I will award expenses in the amount of $2,952.82 for a total award of $11,299.17.

Accordingly,

IT IS ORDERED filing 111 is granted in part and the plaintiff (for the benefit of his lawyer) is awarded an attorney's fee in the amount of $8,346.35 and expenses in the amount of $2,952.82 for a total award of $11,299.17.

DATED this 18th RGK day of June, 1996.

BY THE COURT:

/s/ Richard G. Kopf
Richard G. Kopf
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

GEORGE L. WEAVER, Plaintiff, vs. HAROLD CLARKE, et al, Defendants.	)	4:CV93-3356 **MEMORANDUM AND ORDER** (Filed April 15, 1996)

George L. Weaver (Weaver), a prisoner, has sued various prison officials. He alleges that the defendants have been deliberately indifferent to his serious medical needs by failing to place him in a non-smoking cell between November 6, 1992 and February 2, 1993 and by failing to enforce the non-smoking designation attached to his cell after December 3, 1992.

Since I have granted a motion for summary judgment on the basis of qualified immunity and Eleventh Amendment immunity insofar as Plaintiff's claim for money is concerned, the only issue remaining for resolution is whether Weaver is entitled to injunctive relief. Under *Farmer v. Brennan*, 114 S.Ct. 1970 (1994) the defendants have filed a motion (Filing 95) for summary judgment contending that since all prison buildings are now smoke free the request for injunctive relief must be denied. I agree.

On February 12, 1996, 14 days after Magistrate Judge Piester found that the plaintiff had proven that the defendants were subjecting plaintiff to a substantial risk of harm by not banning smoking altogether in the cell blocks but that the harm was not sufficiently immediate

so as to warrant a preliminary injunction (Filing 90), Harold Clarke, the director of the Department of Correctional Services (DCS), imposed a smoking ban, effective March 18, 1996. (Filing 96, Ex. 17). The ban prohibits "smoking in all DCS owned and/or operated buildings". The ban states that the "Department will aggressively pursue enforcement of this policy. Inmates who choose to violate the policy will be subject to disciplinary action." Clarke has sworn in an affidavit filed with the court that this smoking policy "becomes effective at all DCS facilities on March 18, 1996." (Filing 97 ¶ 8).

Weaver does not dispute these facts. Indeed he has filed no evidence in opposition to the motion for summary judgment. Rather Weaver argues in his brief that "defendants cannot be trusted to maintain the plaintiff in a ETS free cell" primarily because the defendants have been inconsistent in their prior policies and because they resisted plaintiff's effort at a preliminary injunction. (Plt's Br. at 4.)

In *Farmer* the Supreme Court made clear that even where it has been found that defendants have disregarded a substantial risk of harm to a prison inmate in the past "the inmate must demonstrate the continuance of that disregard during the remainder of the litigation and into the future" in order to obtain an injunction. *Id.* at 1983. Here the prison administrators have rectified the situation, and under these circumstances the customary caution with which courts approach the issuance of injunctive relief against prison administrators requires that the request for injunctive relief be denied. *Id.* at 1984.

The arguments of the plaintiff that the prison administrators are not to be trusted lacks factual support. Whatever the problem was in the past (with the Governor's office or otherwise), Clarke has acted quickly to squarely address the January 1996 finding by this court. There is nothing ambiguous about his actions or his policy. On this record, there is not the slightest reason to doubt that Clarke will continue to implement and enforce the new policy that he has *sworn* has been adopted.[1] The policy that Clarke has implemented essentially gives the Plaintiff every bit of prospective relief he has requested in this suit. As a result, the motion for summary judgment must be granted under the precepts of *Farmer.*

I pause here to note that even though the motion for summary judgment will be granted in favor of the defendants thus ending this case, the plaintiff may be a "prevailing" party for attorney fee purposes. *See e.g., Hendrickson v. Branstad,* 934 F.2d 158, 161 (8th Cir. 1991). Therefore, I shall withhold entry of judgment in order for plaintiff to file an application for attorney fees.

Accordingly,

IT IS ORDERED that:

1. the motion (Filing 95) for summary judgment is granted;

2. judgment shall be withheld;

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[1] The consequences to Clarke (and others) should he act contrary to the sworn representations made to this court would be severe.

3. within 14 calendar days of the entry of this memorandum and order if plaintiff desires to make application for attorney fees he shall do so by filing a properly supported application and by submitting a supporting brief, and defendants shall have 14 calendar days thereafter to respond.

DATED this 15th day of April, 1996.

BY THE COURT:

/s/ Richard G. Kopf
RICHARD G. KOPF
United States
District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

GEORGE L. WEAVER,	)	
Plaintiff,	)	**4:CV93-3356**
v.	)	**MEMORANDUM, ORDER, AND RECOMMENDATION**
HAROLD CLARKE, et al.,	)	(Filed Jan. 29, 1996)
Defendants.	)	

Pending before the court is plaintiff's motion for a preliminary injunction. (Filing 61). A hearing on the motion was held before the undersigned on the 18th and 19th of January, 1996.[1] For reasons discussed more fully below, I shall recommend the motion be denied.

BACKGROUND

Plaintiff, a non-smoking inmate confined at the Lincoln Correctional Center ("LCC"), has brought this action against the defendants pursuant to 42 U.S.C. § 1983, alleging that they have been deliberately indifferent to serious health complications he suffers due to continued exposure to environmental tobacco smoke ("ETS").[2] Although the defendants have place plaintiff in a non-

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[1] This matter was referred to me by the Honorable Richard G. Kopf, United States District Judge. (Filing 64).

[2] Although the Court of Appeals characterized his complaint as raising only a claim of deliberate indifference to this [sic] present medical needs, plaintiff has since amended his complaint to include future medical needs as well. (*See* filing 50).

smoking cell, plaintiff asserts that his health conditions persist because of his continued exposure to ETS emanating from adjacent cells and from within the housing unit itself. Plaintiff claims defendants are deliberately indifferent to his present and future medical needs. He seeks injunctive relief.[3] By his motion of for [sic] preliminary injunction, plaintiff requests the court to enjoin the defendants from exposing him to an environment "permeated" with ETS, until his claims can be heard and decided on the merits.

Plaintiff, who has never smoked tobacco products, was transferred to LCC in June of 1992. After his incarceration in LCC, plaintiff began to experience headaches, dizziness, and nausea.[4] He attributes these conditions to the inhalation of smoke from cigarettes, cigars, and loose leaf tobacco products consumed by inmates and guards at LCC. Although inmates and corrections employees are prohibited from smoking in common areas, working areas, and non-smoking cells by a Department of Corrections policy, inmates may smoke in their own cells or outside the building. In addition, plaintiff states that the policy is not enforced "100 percent" by corrections officials. Plaintiff complained of these conditions to medical staff at LCC, and he was eventually given a single cell, upper B-17, in October of 1995. Plaintiff maintains that he still smells smoke in his room on an almost continual

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[3] Judge Kopf granted the defendants' motion for summary judgment with respect to plaintiff's monetary claims on qualified immunity grounds. (Filing 65).

[4] Plaintiff has been prescribed medication for his headaches.

basis during the day despite keeping his cell door closed most of that time.[5] The smoke is strongest during lock down from 3:45 to 5:00 p.m. and at night from 8:45 p.m. to 10:00 p.m.[6] Plaintiff testified that the tobacco smoke enters his cell by way of two 3-inch-by-6-inch vents and the space underneath his cell door which is approximately one-and-a-half inches in height. More than half of the inmates in the B section of the facility smoke either cigarettes, cigars, or loose leaf tobacco.[7] Plaintiff testified that while in disciplinary segregation in the C section of the facility, he did not smell any smoke and he did not experience headaches, dizziness, or nausea.

Plaintiff's expert witness, Joseph T. McGarry, M.D., the Chief Medical Officer for the Colorado Department of Corrections, testified as to the risk of lung cancer, heart disease, pulmonary disease, bronchial problems, and emphysema caused by the inhalation of ETS. Dr. McGarry stated that tobacco smoke contains at least sixteen known

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[5] Plaintiff may have his door open three times a day for periods of ten minutes in length.

[6] Plaintiff works in another part of the complex during some hours of the day.

[7] Plaintiff concedes that inmates in the cells directly below him do not smoke and the evidence was unclear as to whether the inmate in one adjacent cell, upper B-18, smokes. While the inmate in the other cell adjacent to plaintiff, upper B-16, does smoke, the two cells are separated by a wall outside the cells and a door with a one-inch opening beneath it. (*See* Defendant's Ex. 102). The defendants provided testimony through a maintenance employee at LCC that the air in plaintiff's room changes up to four times per hour. However, plaintiff also testified that he is able to see clearly into the other cells through the vents in his cell.

and potential carcinogens, all of which are introduced into the human body through inhalation of ETS. Additionally, Dr. McGarry attested that when one smells smoke from tobacco products, he or she also inhales it into the lungs and nasal passages. While the risks associated with ETS increase with the concentration level of tobacco smoke in a room, there is no safe level of ETS. Dr. McGarry also testified that the only way to remove the risk of medical harm to plaintiff is to place him in a smoke-free environment.[8]

The defendants' expert witness, Dr. John Cherry, the present medical director of the Nebraska Department of Correctional Services, supported Dr. McGarry's testimony that ETS contains carcinogens which are harmful to the human lungs, heart, and linings of the mouth and nasal passages. Dr. Cherry testified that if an inmate exhibited the same conditions as those suffered by plaintiff, he would recommend corrections officials allow the inmate to be placed in a smoke-free environment. In addition, Dr. Cherry acknowledged that the medical consequences of continued exposure to ETS present a substantial risk of medical harm to inmates; only by

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[8] Dr. McGarry noted that symptoms related to ETS commonly include headaches, dizziness, nausea, and pulmonary problems. The physician did not have an opinion as to whether the plaintiff's conditions were caused by ETS, in that since plaintiff's symptoms are largely subjective, it is not possible to reach such an opinion with reasonable medical certainty.

removing a person from such an environment can the substantial risk of harm be eliminated.[9]

Defendant Harold Clarke, Director of the Nebraska Department of Correctional Services ("DCS"), testified as to DCS's current smoking policy prohibiting inmates and corrections employees from smoking in common areas, work areas, and non-smoking cells, but allowing inmates to smoke in their own cells, outside the building, and in certain designated areas.[10] Defendant Clarke detailed his attempts within the last two-and-a-half years to alter DCS's smoking policy so as to prohibit smoking within each of its ten facilities within the state.[11] However, the proposed alteration in DCS's smoking policy has been repeatedly rejected by the Governor of Nebraska and his staff.[12]

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[9] Dr. Cherry also testified that he did not know of a way to completely remove ETS from the air in plaintiff's present cell under the Department's current policy.

[10] DCS's policy has been in place since 1987, with some changes implemented since then.

[11] The proposed plan would be implemented gradually so as to wean inmates from potential addictions to nicotine and would include offering classes to inmates and corrections employees to aid in surmounting such addictions.

[12] Defendant Clarke testified that he again requested permission to implement the no-smoking policy in all DCS facilities as recently as two weeks before the hearing.

PRELIMINARY INJUNCTIVE RELIEF

"Defined broadly, a preliminary injunction is an injunction that is issued to protect plaintiff from irreparable injury and to preserve the court's power to render a meaningful decision after a trial on the merits." Wright, Miller, and Kane, *Federal Practice and Proc.*, § 2947, at 121. The criteria for considering a request for preliminary injunctive relief are clear. This court must take into account:

> (1) the threat of irreparable harm to the plaintiff; (2) the state of the balance between this harm and the injury that granting the injunction will inflict on the parties litigant; (3) the probability that plaintiff will succeed on the merits; and (4) the public interest.

Dataphase Sys., Inc., v. CL Sys., Inc., 640 F.2d 109, 114 (8th Cir. 1981).[13] The inquiry is essentially an equitable one, requiring the court to consider "whether the balance of equities so favors the movant that justice requires the court to intervene to preserve the status quo until the merits are determined."

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[13] These criteria have been reaffirmed repeatedly by the Eighth Circuit. *See e.g. In re Y & A Group Sec. Litigation*, 38 F.3d 380, 383 (8th Cir. 1994); *Baker Elec. Co-op., Inc. v. Chaske*, 28 F.3d 1466, 1472 (8th Cir. 1994); *City of Timber Lake v. Cheyenne River Sioux Tribe*, 10 F.3d 554, 556 (8th Cir. 1993), *cert. denied*, 114 S.Ct. 2741 (1994); *Aziz v. Moore*, 8 F.3d 13, 15 (8th Cir. 1993); *Burlington Northern R. Co. v. Bair*, 957 F.2d 599, 601 n.1 (8th Cir.), *cert. denied*, 113 S.Ct. 69 (1992); *Glenwood Bridge, Inc. v. City of Minneapolis*, 940 F.2d 367 (8th Cir. 1991); *Nordin v. Nutri/System, Inc.*, 897 F.2d 339, 345 (8th Cir. 1990).

Dataphase, 640 F.2d at 113 (footnote omitted). The party seeking preliminary injunctive relief bears the burden of showing that such relief is necessary. *Chaske*, 28 F.3d at 1472; *Jensen v. Dole*, 677 F.2d 678, 680 (8th Cir. 1982). That burden is "particularly heavy" where granting the preliminary injunction will give that party substantially the relief it would obtain after a full trial on the merits. *Id.*

DISCUSSION

(1) Likelihood of Success on the Merits

In considering whether a plaintiff requesting preliminary injunctive relief has demonstrated likelihood of success on the merits of his claim, the Eighth Circuit has cautioned against a "wooden application of the probability test" where the plaintiff must "prove a greater-than-fifty-percent likelihood that he will prevail on the merits." *Dataphase*, 640 F.2d at 113. Rather, likelihood of success "must be examined in the context of the relative injuries to the parties and the public." *Id.*

Plaintiff seeks prospective relief pursuant to 42 U.S.C. § 1983, alleging that the defendants have subjected and continue to subject him to unwanted health complications from constant exposure to environmental tobacco smoke. In *Helling v. McKinney*, 113 S.Ct. 2475 (1993), the United States Supreme Court held that a prison inmate may obtain monetary and injunctive relief under the Eighth Amendment's prohibition against cruel and unusual punishment where corrections officials, "with deliberate indifference, exposed him to levels of ETS that pose an *unreasonable risk of serious damage* to his future

health." 113 S.Ct. at 2481 (emphasis added). The following year, the Court clarified the standard for Eighth Amendment claims by prison inmates in *Farmer v. Brennan*, 114 S.Ct. 1970 (1994), holding that "a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health and safety; the official must both be aware of facts from which the inference could be drawn that a *substantial risk of serious harm* exists, and he must also draw the inference." *Id.* (emphasis added). The two opinions seem to diverge in the degree of risk required to be shown in ETS cases.[14] As *Farmer* further defines inmate claims under the Eighth Amendment subsequent to *Helling*, it appears that the "substantial risk" standard in *Farmer* is the proper formulation of the degree of risk required to be shown by an inmate in order to obtain injunctive relief in an ETS case.[15]

In this case the evidence that the plaintiff's continued exposure to ETS presents a substantial risk of serious harm is considerable. Plaintiff testified that he smells

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[14] Compare the "substantial risk" requirement in *Farmer* with the "unreasonable risk" requirement in *Helling*.

[15] *Farmer* addresses requests for injunctive relief by inmates in terms of preventing "a substantial risk of serious injury from ripening into actual harm. . . . " *Id.* Stated in terms of the *Dataphase* criteria which must be considered in regard to the issuance of preliminary injunctions, the threat of irreparable injury posed by the conduct at issue must be of such a degree that it constitutes a substantial risk of serious injury to the plaintiff during the pendency of the case.

tobacco smoke continually throughout the day.[16] Additionally, Dr. McGarry stated that when one smells tobacco smoke, it is being taken into the lungs and nasal passages. A portion of the testimony by the defendants' own witness, Dr. Cherry, proceeded as follows:

> Q. Sir, would you agree with me that cigarette smoke can cause respiratory disease?
>
> A. Yes.
>
> Q. Would you agree that it can cause lung cancer?
>
> A. Yes.
>
> Q. And would you agree that cigarette smoke aids in the development of heart disease?
>
> A. Yes.
>
> Q. And would you agree with me that it contributes to chronic airway obstruction?
>
> A. Yes.
>
> Q. Dr. Cherry would you agree with me that the medical consequences of continued exposure to environmental tobacco smoke is a substantial physical harm?
>
> [Objection as to form of the question overruled.]
>
> A. Yes.
>
> Q. And would you agree with me that by removing a person from an environment that

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[16] Although defense witnesses testified that the air in plaintiff's cell changes completely four times per hour, such testimony does not frustrate plaintiff's claim, as the evidence is undisputed that *any* exposure to ETS is harmful.

contains environmental tobacco smoke that would eliminate that substantial risk of medical harm?

A. Yes.

Moreover, Dr. McGarry testified that any level of ETS may be dangerous to a person's health, and that there is no "safe" level of exposure to ETS. Dr. Cherry did not disagree. Respiratory disease, chronic pulmonary and airway obstruction, cancer, and heart disease are obviously serious and harmful medical conditions.

The court in *Farmer* remarked that in order to survive a motion for summary judgment on a claim for injunctive relief, an inmate "must come forward with evidence from which it can be inferred that the defendant-officials . . . were knowingly and unreasonably disregarding an objectively intolerable risk of harm, and that they will continue to do so; and finally to establish eligibility for an injunction, the inmate must demonstrate the continuance of that disregard during the remainder of the litigation and into the future." 114 S.Ct. 1970 (1994). In a case such as this, where defendant corrections officials have argued that they had no actual knowledge that the conditions of the plaintiff's confinement subjected him to a substantial risk of serious harm, the *Farmer* decision presents a curious irony: After the defendants have been apprised of testimony during a hearing for preliminary relief that their conduct has caused or will cause a substantial risk of serious injury to the plaintiff's health, such as the testimony of Dr. Cherry and Dr. McGarry, the defendants

from that time forward may be said to have *actual knowledge* of that risk.[17] Furthermore, even if the defendants disagree with the actual degree of the risk, once the court concludes that such risk is "substantial," *Farmer* requires them to take reasonable precautions to avoid that risk, because they are bound by the court's determination. Thus, such a finding is undeniable knowledge of the risk, and defendants must act to avoid it. Any other response by the defendants is tantamount to obduracy.[18] Hence, when a court of competent jurisdiction concludes that such a risk exists, the potential exposure of the defendants to liability is heightened. In the hearing in this case, the evidence was sufficient to support a finding that the risk to plaintiff of the present levels of ETS does, over time, constitute a "substantial risk of serious harm" to plaintiff's future health. While there was no evidence correlating the risk to any particular duration of the exposure, such a correlation does not appear to be necessary for entry of a permanent injunction. Therefore, in light of the testimony presented at the hearing and the foregoing discussion, I conclude that plaintiff has demonstrated a likelihood of success on the merits.

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[17] "[A] factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." *Farmer, supra.*

[18] "It is obdurate, wanton or intentional inflictions of unnecessary pain, not mere inadvertence or good faith mistakes as to the amount of force reasonably called for, which violate the Eighth Amendment." *Hickey v. Reeder*, 12 F.3d 754, 756-57 (8th Cir. 1993) (citing *Whitley v. Albers*, 475 U.S. 312, 319 (1986).

(2) Balance of Hardships to the Parties

"The second factor bearing on the court's exercise of its discretion as to whether to grant preliminary relief involves an evaluation of the severity of the impact on the defendant should the temporary injunction be granted and the hardship that would occur to plaintiff if the injunction should be denied." Wright, *supra*, § 2948.2, at 166-67. As discussed above, plaintiff requests the court to enjoin the defendants from exposing him to an environment which includes ETS until resolution of this case. No evidence was adduced suggesting that a preliminary injunction would impose a significant burden on the defendants. In fact, two alternatives appear possible. First, several witnesses testified that two cells designed for inmates with tuberculosis are available at LCC which can provide air to occupants that is not contaminated with tobacco smoke. Second, the plaintiff's housing pod or the entire facility can be made smoke free by a change of policy. Defendant Clarke explained that he aims to implement a policy which would ban smoking in corrections facilities altogether and, in fact, would have done so by now were it not for the Governor blocking such implementation. Defendant Clarke even testified that he again requested permission within the last few weeks to implement such a policy. It stretches credulity to assert that ordering the defendants to do that which they already desire to do would impose a hardship upon them. No witness testified that either of these alternatives would cause any injury or harm to defendants. Hence, I conclude that the potential harm to plaintiff outweighs "the injury that granting the injunction would inflict on other

interested parties litigant[.]" *City of Timber Lake v. Cheyenne River Sioux Tribe*, 10 F.3d 554, 556 (8th Cir. 1993), *cert. denied*, 114 S.Ct. 2741 (1994).

(3) The Public Interest

In considering a motion for preliminary injunctive relief, the court also must consider whether the grant of a preliminary injunction is in the public's interest. *Dataphase*, 640 F.2d at 114. While Defendant Clarke indicated that allowing inmates to smoke while incarcerated might provide a potential benefit by "pacifying" inmates so as to avert violent behavior, Dr. Cherry stated there was no benefit to allowing inmates to smoke, and Dr. McGarry opined that any potential benefit of permitting some inmates to smoke in their cells is outweighed by dangers accompanying exposure to ETS and its risks. Moreover, as health care expenses for DCS inmates are paid by the state, the public undoubtedly has an interest in lowering the costs of unnecessary inmate health care expenses from the development of medical problems associated with the consumption of tobacco by smokers and exposure of non-smokers to ETS. Finally, the defendants may simply place plaintiff in one of the tuberculosis cells not contaminated with ETS and thereby avoid the expense to the public of providing possible future medical treatment to plaintiff for health conditions caused by ETS. In summary, there is ample evidence that the grant of a preliminary injunction prohibiting the defendants from exposing plaintiff to an environment with ETS is in the public interest.

(4) Irreparable Harm

The "threshold inquiry" in all requests for injunctive relief "is whether the movant has shown the threat of irreparable injury." *Gelco Corp. v. Coniston Partners*, 811 F.2d 414, 418 (8th Cir. 1987).

> Perhaps the single most important prerequisite for the issuance of a preliminary injunction is a demonstration that if it is not granted the applicant is likely to suffer irreparable harm *before a decision on the merits can be rendered*,. . . . Only when the threatened harm would impair the court's ability to grant an effective remedy is there really a need for preliminary relief. Therefore, if a trial on the merits can be conducted before the injury would occur there is no need for interlocutory relief.

Wright, *supra*, § 2948.1, at 139-49 (emphasis added) (citations omitted).[19] Failure to sustain the burden of proving irreparable harm may end the inquiry "and a denial of

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[19] *See also Sanborn Man. Co. v. Campbell Hausfeld/Scott Fetzer Co.*, 997 F.2d 484, 489 (8th Cir. 1993) ("The primary function of a preliminary injunction is to preserve the status quo *until, upon final hearing, a court may grant full, effective relief.*") (emphasis added) (quoting *Ferry-Morse Seed Co. v. Food Corn, Inc.*, 729 F.2d 589, 593 (8th Cir. 1984); *Olin Water Serv. v. Midland Research Lab., Inc.*, 774 F.2d 303, 308 (8th Cir. 1985) ("The purpose of a preliminary injunction is merely to preserve the relative positions of the parties *until trial on the merits can be held.*") (emphasis added); *Moore's Federal Practice*, § 65.04[1], at 65-33 ("The purpose of the preliminary injunction is to preserve the status quo between the parties *pending a final determination of the merits of the action.*") (emphasis added) (citations omitted).

the injunctive request is warranted."[20] *Id.* at 420. Although the balance of the other equities in this case lies with the plaintiff, I conclude plaintiff has failed to demonstrate that the irreparable harm he has been exposed to by the defendants will occur before a trial on the merits can be conducted.[21] "[A] showing of irreparable harm is insufficient [to warrant the grant of a preliminary injunction] if the harm will occur only in the indefinite future; the moving party must make a clear showing of *immediate* irreparable harm." *N.B.A. Credit Union v. Hargrove,* 834 F.Supp. 845 (E.D. Pa. 1993) (emphasis added) (citing *Hohe v. Casey,* 868 F.2d 69, 72 (3d Cir.), *cert denied,* 493 U.S. 848 (1989).

While the evidence established that the medical consequences of continued exposure to ETS – even at low levels of concentration – present a substantial risk of harm to plaintiff and others in his residential situation, plaintiff presented no evidence that such irreparable harm will occur during the intervening period of time between the hearing on his motion for a preliminary injunction and final resolution of his claim on the merits. Although expert testimony revealed that there is no safe

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[20] Although no single *Dataphase* factor is dispositive, a movant must establish a threat of irreparable injury, without which a preliminary injunction should not be issued. *Modern Computer Sys., Inc. v. Modern Banking Sys., Inc.,* 871 F.2d 734, 738 (8th Cir. 1989) (en banc).

[21] As discussed above, plaintiff has proven that the defendants are subjecting him to a substantial risk of harm. Therefore, I also find that continued exposure of plaintiff to environmental tobacco smoke constitutes a threat of irreparable harm.

level of ETS, neither that testimony nor any other evidence presented at the hearing suggests that harmful medical conditions caused by the inhalation of ETS, such as lung cancer, heart disease, pulmonary disease, bronchial problems, and emphysema, threaten to afflict plaintiff before final resolution of his claims. Additionally, plaintiff presented no evidence which established the length of exposure to ETS necessary before the substantial risk of harm would ensue.

Regarding present medical needs, although plaintiff complains of dizziness and headaches upon his exposure to tobacco smoke, the evidence is not sufficient to show a causal relationship between those problems and ETS, nor that he has been prevented by defendants from receiving appropriate treatment. *See e.g., Farmer v. Brennan, supra* at 1976 (the Constitution "does not mandate comfortable prisons. . . . "); *see also Williams v. Delo,* 49 F.3d 442, 445 (8th Cir. 1995) (mere discomfort does not state a claim for relief under the Eighth Amendment); *Guzman v. Marshall,* 1995 WL 552301 (N.D. Cal. 1995) (unpublished disposition) ("neither inconvenience nor de minus [sic] injuries [caused by ETS] implicate the Eighth Amendment."). In addition, in view of the fact that plaintiff waited nearly one year to file the motion for preliminary injunctive relief (the case was stayed or on appeal for some ten months), I find it difficult to understand how now the harm has become irreparable as related to plaintiff's present medical needs.

Plaintiff has failed to prove that irreparable harm will result before a decision on the merits can be made. Because plaintiff has failed to satisfy this "threshold inquiry," I shall recommend his motion for preliminary

injunctive relief be denied. *See Gelco,* 811 F.2d at 420. However, as discovery has been completed and this case has now been pending for over two years,[22] I shall advance the trial on plaintiff's request for permanent injunctive relief.

Since plaintiff's claims for damages have been dismissed, this case will be tried before the court without a jury. Therefore, in accordance with the referral of Judge Kopf, filing 85, I shall schedule an evidentiary hearing before me. In addition, I shall establish new discovery deadlines for this matter.

IT THEREFORE HEREBY IS ORDERED:

1. The evidentiary hearing on plaintiff's request for a permanent injunctive relief is set for May 15, 1996 in Courtroom 2, at 9:00 a.m.

2. The pretrial conference will be held on April 16, 1996, at 2:00 p.m.

3. The deposition deadline is continued to April 2, 1996 and other deadlines which use the deposition deadline as a point of reference are extended accordingly.

4. All other provisions of the court's order setting this case for trial shall remain in effect.

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[22] The defendants filed an interlocutory appeal of this court's denial of a previous motion to dismiss; such denial was upheld by the Eighth Circuit. *Weaver v. Clarke,* 45 F.3d 1253 (8th Cir. 1995). In addition, although defendants sought a stay of discovery pending resolution of their summary judgment motion, the stay was denied and discovery was allowed to proceed. (*See* filings 54 and 60).

FURTHER, IT THEREFORE HEREBY IS RECOMMENDED to the Honorable Richard G. Kopf, United States District Judge, pursuant to 28 U.S.C. § 636 (b)(1)(B), that plaintiff's motion for a preliminary injunction, filing 61, be denied.

The parties are notified that unless objection is made within ten days after being served with a copy of this recommendation, they may be held to have waived any right they may have to appeal the court's order adopting this recommendation.

Dated January 29, 1996.

BY THE COURT

/s/ David L. Piestel
United States
Magistrate Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

GEORGE L. WEAVER, Plaintiff, vs. HAROLD CLARKE, et al., Defendants.	)	4:CV93-3356 **MEMORANDUM AND ORDER** (Filed Nov. 6, 1995)

Pending before the court is Defendants' motion for summary judgment based on qualified immunity as to the suit for money damages in their individual capacities, and asserting the defense of Eleventh Amendment immunity as to the suit for money damages in their official capacities (filing 56). I will grant Defendants' motion and will dismiss Plaintiff's complaint to the extent the complaint seeks monetary damages against the defendants.[1]

BACKGROUND

The plaintiff is incarcerated in the Lincoln Correctional Center (LCC) and at the time relevant to this litigation Plaintiff was housed in B Unit of the LCC.

Defendant Harold Clarke is Director of the Department of Correctional Services (DCS). Defendant John

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[1] Currently pending is Plaintiff's motion for preliminary injunction, seeking relocation to a non-smoking housing unit. This motion has been specifically referred to Magistrate Judge Piester for resolution as the determination of the Eighth Amendment claim does not necessarily resolve the claim for injunctive relief. *Farmer v. Brennan*, 114 S.Ct. 1970, 1983 (1994). See filing 64.

Dahm is currently employed as Warden of the Omaha Correctional Center, although at the time relevant to this litigation Defendant Dahm was warden of LCC. Defendant Willem Looye is currently employed as a Corporal at Diagnostic and Evaluation Center (DEC) although at the time relevant to this litigation Defendant Looye was employed as a Unit Case Worker in B Unit of the LCC. Defendant Doug Reeves is currently employed as Case Manager in B Unit of the LCC, although at the time relevant to this litigation Defendant Reeves was employed as a Case Manager, as well as the Acting Unit Manager on a two-week rotating basis, in B Unit of the LCC. Defendant David Skow is currently employed as Case Manager in A Unit of the LCC, although at the time relevant to this litigation Defendant Skow was employed as a Unit Case Manager, as well as the Acting Unit Manager on a two-week rotating basis, in B Unit of the LCC. Defendant Stephen Shutzer is currently employed as a Case Worker in C Unit at the LCC, although at the time relevant to this litigation Defendant Shutzer was employed as a Unit Case Worker in B Unit of the LCC. Defendant Robby Predmore is currently employed as Unit Case Manager in the C Unit of the LCC, although at the time relevant to this litigation Defendant Predmore was employed as a Unit Case Manager, as well as the Acting Unit Manager on a two-week rotating basis in B Unit of the LCC. Defendant Harold Thies was employed as a Unit Case Worker in B Unit of the LCC of the LCC [sic] at the time relevant to this litigation. Defendant Donn Atkinson is currently employed as Unit Case Worker in D Unit at LCC, although at the time relevant to

this litigation Defendant Atkinson was employed as a Unit Case Worker in B Unit of the LCC.

Plaintiff is a non-smoker and he claims he suffers from serious medical problems when exposed to environmental tobacco smoke (ETS). Plaintiff alleges the defendants were deliberately indifferent to his serious medical needs by failing to place him in a non-smoking cell between November 6, 1992 and February 2, 1993 after repeatedly complaining that rooming with a smoking roommate was making him sick and by failing to enforce the non-smoking designation attached to his cell after December 3, 1992. Plaintiff also complains that the defendants continue to be deliberately indifferent to his medical needs by subjecting him to ETS in his housing unit even though he is now housed in a non-smoking room with a non-smoker.[2] Plaintiff alleges that his Eighth Amendment rights to be free from cruel and unusual punishment are being violated as a result of the defendants' deliberate indifference. The plaintiff has sued the defendants for money and injunctive relief pursuant to 42 U.S.C. § 1983.

FACTUAL BACKGROUND

I find the following to be the material uncontroverted facts:

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[2] Plaintiff's claim for injunctive relief has been specifically referred to the Magistrate Judge for evidentiary hearing and report and recommendation. See filing 64.

1. From November 6, 1992 through February 2, 1993 Plaintiff, a non-smoker, shared a cell with an inmate who smoked cigarettes and cigars. (Affidavit of Plaintiff, filing 62, ¶¶ 1, 4; filing 57, Defendants' Exhibits 1-8).

2. In 1987 the LCC implemented a smoking policy (Operational Memorandum (OM) 111.5.2.1) which designated specific smoking/non-smoking areas within LCC. (Filing 57, Exh. 11).

3. It is the standard operating procedure of the LCC that if an inmate makes a complaint to staff regarding a smoking roommate, the inmate may request, pursuant to the procedure set forth in OM 111.5.2.1, that his cell be designated non-smoking.

4. On November 25, 1992 Plaintiff filed a Step One Grievance pursuant to OM 111.5.2.1 complaining about being housed with a smoker. On December 3, 1992, the Plaintiff received a response from Defendant Dahm that Plaintiff's cell had been designated as a non-smoking cell. (Filing 57, Exhs. 2, 12).

5. Sometime subsequent to December 3, 1992, Defendant Shutzer issued a misconduct report to Plaintiff's cellmate, Ronald Davis, as Davis was caught smoking in the cell which had been designated a non-smoking cell. (Filing 57, Exh. 5, ¶ 7). On December 17, 1992 Plaintiff submitted a grievance after a shakedown of the cell complaining that it should be obvious that the cellmate was continuing to smoke in the cell. The shakedown report did not establish the presence of tobacco products, although two ashtrays were confiscated. (Filing 57, Exh. 13). In Response to this grievance Plaintiff was advised to

contact management of the housing unit for an investigation. (Filing 57, Exh. 14). There are no further grievances in evidence which establish Plaintiff ever sought further investigation or assistance of any kind from housing unit management.

6. On or about February 2, 1993, the defendants received information from the medical department which indicated Plaintiff needed to be housed with a non-smoker. The plaintiff was moved to a cell with a non-smoker on February 2, 1993. (Filing 57, Exhs. 1, 3, 4, 5, 6, 7 and 8).

7. On September 1, 1992, October 1, 1992, October 22, 1992, January 26, 1993 and February 2, 1993 the plaintiff contacted the medical department complaining of headaches. The complaint of February 2, 1993 was the first time Plaintiff associated his headaches with living with a smoking cellmate. (Filing 57, Exh. 15 and Exh. 9, § 7).

LAW

Defendants assert two defenses: (a) qualified immunity in their individual capacity as to Plaintiff's claim for money; and (b) Eleventh Amendment immunity in their official capacity as to Plaintiff's claim for money. Defendants are entitled to both types of immunity.

A. Qualified Immunity

1. Generally

Qualified immunity shields government officials, such as corrections officials, who act within the scope of their duties from suit for monetary damages in their individual capacities so long as "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). In plain words, qualified immunity "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

In *Anderson v. Creighton*, 483 U.S. 635 (1987), monetary damages were sought against an FBI agent for conducting a warrantless search of the plaintiff's home in violation of the Fourth Amendment. The FBI agent conducted the search because he believed, albeit erroneously, that a bank robber might be found in the home. The district court granted summary judgment for the agent, holding that he had probable cause to search the home and that his failure to obtain a warrant was justified by exigent circumstances. The United States Court of Appeals for the Eighth Circuit reversed on appeal, holding that there were unresolved factual disputes as to the existence of probable cause and exigent circumstances. The court of appeals also held that the agent was not entitled to qualified immunity because the right allegedly violated – the right to be free from a warrantless search absent probable cause and exigent circumstances – was clearly established.

The Supreme Court reversed the decision of the court of appeals, stating that in order to defeat a defense of qualified immunity, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand *that what he is doing violates that right.*" *Id.* at 640 (emphasis added). The "relevant question" then "is the objective (albeit fact-specific) question" of "whether a reasonable [defendant] could have believed [the challenged conduct] to be lawful, in light of clearly established law and the information [the defendant] possessed." *Id.* at 641. The defendant's "subjective beliefs" about his or her conduct "are irrelevant." *Id.* Accordingly, the Court reversed and remanded.

2. Eighth Amendment and ETS

To apply the defense of qualified immunity, a court must determine what the "clearly established law" was at the time of the incident in question. I turn to that task next.

In the ETS context a prisoner plaintiff may recover on an Eighth Amendment claim by proving either: (1) deliberate indifference to an existing legitimate medical need related to ETS, or (2) deliberate indifference to a substantial risk of future harm related to ETS. *Weaver v. Clarke,* 45 F.3d 1253, 1255 (8th Cir. 1995).

The law has been clearly established since 1976 that a prison official cannot, consistent with the Eighth Amendment, be deliberately indifferent to an existing legitimate medical need caused by ETS. *Id.* (citing *Estelle v. Gamble,*

492 U.S. 97 (1976)). And the law has been clearly established since June 18, 1993, when the Supreme Court decided *Helling v. McKinney*, 113 S. Ct. 2475, 2481-82 (1993), that a prison official cannot, consistent with the Eighth Amendment, be deliberately indifferent to the risk of future harm to an inmate caused by ETS. *Weaver*, 45 F.3d at 1255.

Clearly, then, an Eighth Amendment claim may be predicated upon a prison official's "deliberate indifference" to ETS either because the official disregards a present risk to the inmate's health or a future risk to an inmate's health. It is therefore necessary to discuss the meaning of "deliberate indifference" in some detail.

The United States Supreme Court has defined the test for whether prison authorities have acted with "deliberate indifference" toward prisoners in violation of the Eighth Amendment as "subjective recklessness"; that is, the prison official must know of and disregard an excessive risk to the inmate's health or safety. *Farmer v. Brennan*, 114 S. Ct. 1970, 1979-80 (1994). The prison official "must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Id.* at 1979.

Moreover, "prison officials who actually knew of a substantial risk to inmate health or safety may be found free from liability if they responded reasonably to the risk, *even if the harm ultimately was not averted.*" *Id.* at 1982-83 (emphasis added). Stated simply, "prison officials who act reasonably cannot be found liable under the Cruel and Unusual Punishments Clause" and this is so "even if the harm ultimately was not averted." *Id.* at 1983.

3. Deliberate Indifference and the Facts

It is now appropriate to examine Plaintiff's claims in light of the defense of qualified immunity. To reiterate, Plaintiff makes the following claims: Plaintiff is a non-smoker and he claims he suffers from serious medical problems when exposed to ETS. Plaintiff alleges the defendants were deliberately indifferent to his serious medical needs by failing to place him in a non-smoking room with a non-smoking cellmate upon complaining about his smoking roommate from November 6, 1992 through February 2, 1993, and that they failed to enforce the non-smoking designation attached to his cell after December 3, 1992. Plaintiff also claims that Defendants are continuing to be deliberately indifferent to his medical needs by subjecting him to ETS in his housing unit since his non-smoking room is surrounded by rooms where inmates are permitted to smoke. Plaintiff alleges that his Eighth Amendment rights to be free from cruel and unusual punishment are being violated as a result of this continuing deliberate indifference to his medical needs and in this instance Plaintiff seeks injunctive relief.

While the court must view the evidence in this case in the light most favorable to Plaintiff, the evidence in this case fails to establish deliberate indifference to Plaintiff's existing medical situation on the part of Defendants.[3] I come to this conclusion for the following reasons.

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[3] I have treated the defendants as a group, for the most part, since the plaintiff has not submitted any specific evidence of specific acts of deliberate indifference committed by each defendant individually. While Plaintiff's complaint and affidavit contain many statements about what this one or that

(a) Deliberate Indifference Generally

Generally speaking, there is no evidence that the defendants were deliberately indifferent to Plaintiff's medical needs from November 6, 1992 through February 2, 1993.[4] Regarding Defendant Clarke, the evidence indisputably shows that he caused to be developed *prior* to Plaintiff's complaints specific, detailed and thoughtful policies regarding the smoking issue. In turn, this is highly probative evidence that Defendant Clarke has not been deliberately indifferent to ETS. *Helling*, 113 S. Ct. at 2482 (commenting on a new smoking policy adopted after judgment, and noting that as a result "it could be very

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one failed to do for him, there are no grievances directed toward the behavior of the defendants individually which would establish what they knew, and how they disregarded Plaintiff's complaints thus placing Plaintiff at risk for serious harm. Defendants claim they do not remember being told certain things. And without evidence from Plaintiff that they knew of his medical problem, there are no facts in dispute which would prevent the court from entering summary judgment in favor of the defendants.

[4] Plaintiff "bears the burden of going beyond the allegations in his pleadings and coming forward with evidence establishing a genuine dispute [about the alleged wrongful conduct]." *Howard v. Suskie*, 26 F.3d 84, 87 (8th Cir. 1994) (reversing district court's refusal to grant summary judgment on qualified immunity defense). Unlike the pleading stage, where the court must accept the factual allegations in the complaint as true, *Weaver v. Clarke*, 45 F.3d 1253, 1256 (8th Cir. 1995) (upholding denial of motion to dismiss on qualified immunity grounds at the pleading stage in ETS case), at the summary judgment stage Plaintiff must go beyond his pleadings and show a genuine dispute about a material fact in order to avoid summary judgment. *Howard*, 26 F.3d at 87.

difficult to demonstrate that prison authorities are ignoring the possible dangers posed by exposure to ETS").

Moreover, the evidence indisputably establishes that when Plaintiff had a *demonstrated* medical problem involving ETS, both the medical staff and the warden's office and the housing staff responded quickly and forcibly, treating the problem as an "emergency," and on the very day the medical department determined Plaintiff should be housed with a non-smoker, Plaintiff's room assignment was changed. This, too, strongly disproves Plaintiff's factually unsupported claim of "deliberate indifference."

In this connection, it should be noted that the United States Court of Appeals for the Eighth Circuit has explicitly held that "a prisoner is not entitled to a non-smoking room simply because he wants one." *Weaver*, 43 F.3d at 1255 n.2. Thus, Plaintiff's complaints that the smoking in his room was making him sick, prior to the February 2, 1993 determination by the medical department at NSP that Plaintiff needed a non-smoking room, are not probative on the issue of deliberate indifference.

Plaintiff also complains that the defendants were deliberately indifferent to his needs by failing to vigorously enforce the non-smoking designation attached to his original cell on and after December 3, 1992, through the date of his transfer to a cell with a non-smoking roommate.

There is no dispute that prisoners often break the rules, including the ban on smoking. But there is no evidence that these defendants have been deliberately indifferent to those infractions.

To begin with, this is an area where the court must be especially sensitive to the very difficult task that confronts prison officials. Importantly, the Supreme Court has specifically recognized that the question of how prison officials enforce a ban on smoking requires a court to carefully consider "the realities of prison administration." *Helling*, 113 S. Ct. at 2482.

In carefully considering these "realities," it must be understood that the Eighth Amendment is not a guarantee of absolute safety. *Farmer*, 114 S. Ct. at 1983. Rather, if the defendants have responded "reasonably" to the risk, "even if the harm ultimately was not averted," then prison officials have satisfied their " 'unenviable task of keeping dangerous men in safe custody under humane conditions.' " *Id.* at 1982-83 (quoting *Spain v. Procunier*, 600 F.2d 189, 193 (9th Cir. 1979)).

The material undisputed facts conclusively establish that these defendants were not deliberately indifferent to the fact that some prisoners violated the ban on smoking, but in fact acted reasonably. I turn to that evidence now.

Sometime subsequent to December 3, 1992, Defendant Shutzer issued a misconduct report to Plaintiff's cellmate, Ronald Davis, as Davis was caught smoking in the cell which had by then been designated a non-smoking cell. (Filing 57, Exh. 5, ¶ 7). Plaintiff complains that even after his cell was designated a non-smoking cell his cellmate continued to smoke in the cell. On December 17, 1992 Plaintiff submitted a grievance after a shakedown of the cell complaining that it should be obvious that the cellmate was continuing to smoke in the cell. The shakedown report did not establish the presence of tobacco

products, although two ashtrays were confiscated. (Filing 57, Exh. 13). In response to this grievance Plaintiff was advised to contact management of the housing unit for an investigation. (Filing 57, Exh. 14). There are no further grievances in evidence which establish Plaintiff ever sought further investigation or assistance of any kind from housing unit management.

There is no evidence in this record that defendants were deliberately indifferent to violations of the smoking ban.

4. Summary

In summary, the law is and was that prison officials violate the Eighth Amendment's ban on cruel and unusual punishment when they act or fail to act with "deliberate indifference" regarding a present or future substantial risk to an inmate's health or safety. *Farmer v. Brennan,* 114 S. Ct. 1970, 1979-80. The prison official "must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Id.* at 1979. In this regard, "prison officials who act reasonably cannot be found liable under the Cruel and Unusual Punishments Clause" and this is so "even if the harm ultimately was not averted." *Farmer,* 114 S. Ct. at 1983.

I find and conclude that a reasonable prison official who acted (or failed to act) as Defendants did in this case would not have known that their conduct violated clearly established law, *Anderson v. Creighton,* 483 U.S. at 640, because there was nothing about their acts or omissions

regarding ETS which manifested the slightest suggestion of "deliberate indifference" to Plaintiff's present medical needs. Accordingly, the defendants are entitled to qualified immunity from damages in their individual capacities.

B. Eleventh Amendment Immunity

Because a suit for money against state employees is practically a suit against the state, defendants in their official capacities have immunity under the Eleventh Amendment. *See, e.g., Will v. Michican Dep't of State Police,* 491 U.S. 58, 71 (1989) ("[A] suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. . . . As such, it is no different from a suit against the State itself.") (citations omitted). There is no claim by Plaintiff that the State of Nebraska has waived its Eleventh Amendment immunity. Accordingly, the defendants in their official capacities have Eleventh Amendment immunity from a suit seeking money damages.

Accordingly,

IT IS ORDERED that Defendants' motion for summary judgment (filing 56) is granted in Plaintiff's complaint for damages against the defendants in their individual and official capacities is dismissed.[5]

---

[5] Final judgment is withheld, however, pending resolution of Plaintiff's request for prospective injunctive relief.

DATED this 6th day of November, 1995.

BY THE COURT:

/s/ Richard G. Kopf
Richard G. Kopf
United States
District Judge

APPENDIX G

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 96-2952

George L. Weaver,

Plaintiff/Appellee,

v.

Harold W. Clarke, Director, Correctional Services, Lincoln Correctional Center; John J. Dahm, Warden, Chief Executive Officer, Lincoln Correctional Center; Douglas L. Reeves; David Skow; Robby G. Predmore; Willem Looye,

Defendants/Appellant,

Roger O. Doerr,

Defendant,

Stephen W. Shutzer; Donald Earl Atkinson; Harold F. Thies, Jr.,

Defendants/Appellants.

4:93CV3356

Appeals from the United States District Court for the District of Nebraska.

(Filed July 23, 1997)

No. 96-3008

George L. Weaver,	*
Plaintiff/Appellant,	*
v.	*
Harold W. Clarke, Director, Correctional Services, Lincoln Correctional Center; John J. Dahm, Warden, Chief Executive Officer, Lincoln Correctional Center; Douglas L. Reeves; David Skow; Robby G. Predmore; Willem Looye,	*
Defendants/Appellees,	*
Roger O. Doerr,	*
Defendant,	*
Stephen W. Shutzer; Donald Earl Atkinson; Harold F. Thies, Jr.,	*
Defendants/Appellees.	*

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this

cause is affirmed in accordance with the opinion of this court.

July 23, 1997

A true Copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX H

U.S. Const. amend. XI

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XIV § 1

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV § 5

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

42 U.S.C. § 1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity,

or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1988

§ 1988. Proceedings in vindication of civil rights

(a) Applicability of statutory and common law

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of titles 13, 24, and 70 of the Revised Statutes for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, it is of a criminal nature, in the

infliction of punishment on the party found guilty.

(b) Attorney's fees

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C.A. § 1681 *et seq.*], the Religious Freedom Restoration Act of 1993 [42 U.S.C.A. § 2000bb *et seq.*], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d *et seq.*], or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

42 U.S.C. § 1997(e)

(d) ATTORNEY'S FEES – (1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under section 2 of the Revised Statutes of the United States (42 U.S.C. 1988), such fees shall not be awarded except to the extent that –

(A) The fee was directly and reasonably incurred in proving an actual violation of the plaintiff's rights protected by a statute pursuant to which a fee may be awarded under section 2 of the Revised Statutes; and

(B)(i) The amount of the fee is proportionately related to the court ordered relief for the violation; or

(ii) The fee was directly and reasonably incurred in enforcing the relief ordered for the violation.

(2) Whenever a monetary judgment is awarded in an action described in paragraph (1), a portion of the judgment (not to exceed 25 per cent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant. If the award of attorney's fees is not greater than 150 per cent of the judgment, the excess shall be paid by the defendant.

Supreme Court, U.S.
FILED
DEC 23 1997
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(2)

NO. 97-627

In The

Supreme Court of the United States

October Term, 1997

*

HAROLD CLARKE, et al.,

Petitioners,

vs.

GEORGE WEAVER,

Respondent.

*

On Petition For Writ of Certiorari To The United States Court of Appeals For The Eighth Circuit

*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

*

Submitted by:

Bernard J. Monbouquette
3610 Dodge Street Suite 220
Omaha, Nebraska 68131
(402) 346-1490

12 pp

QUESTIONS PRESENTED.

1. Objection is made to consideration of the first Question Presented in the Petitioners' Petition for Writ of Certiorari. Petitioners assert that they were the prevailing party, which is not totally accurate. The District Court and Eighth Circuit found that the respondent inmate was the prevailing party in that he obtained relief from environmental tobacco smoke (ETS) as a result of his litigation (catalyst theory). The question actually presented by Petitioners' Petition for Certiorari is whether 42USC § 1988 authorizes an award of attorney fees.

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STATEMENT OF THE CASE

George Weaver filed this action, pro se, in the federal district court pursuant to 42 U.S.C. § 1983 in 1993 seeking damages for his continued exposure to secondary tobacco smoke. Attorney Bernard J. Monbouquette was appointed to represent Mr. Weaver due to Weaver's indigence. Mr. Weaver's lawsuit was amended to add a claim for injunctive relief to the damage claim. The injunctive claim sought a smoke-free environment for Mr. Weaver during his incarceration. The defendants, all officials and employees of the Nebraska Department of Corrections, opposed vigorously the claim for injunctive relief, arguing essentially that the jail officials were unable to provide Mr. Weaver with a smoke-free environment, regardless of their own opinions and desires. (Appendix E, App.34,41.)

The jail officials filed a Motion for Summary Judgment based on qualified immunity, which was granted by the District Court Judge Richard G. Kopf, on November 6, 1995. (Appendix F.) Mr. Weaver filed a Motion for Temporary Injunction, which was argued before United States Magistrate Judge David Piester on January 18 and 19, 1996. On January 28, 1996, Magistrate Judge Piester concluded that Mr. Weaver had presented evidence sufficient to support a finding that the risk to Mr. Weaver of the present levels of environmental tobacco smoke (ETS), over time, constituted a substantial risk of serious harm to his health. (Appendix E,

App.36-40) Once the Court concluded that such risk was substantial, Judge Piester ruled that jail officials were required to take reasonable precautions to avoid the risk. He remarked that for them to make any lesser response would amount to obduracy. (Appendix E, App. 40).

On February 12, 1996, fourteen days after Judge Piester's ruling, Petitioner Harold Clarke, imposed a smoking ban for inmates, which took effect on March 18, 1996. When he announced the ban, he said that "pending inmate litigation, both locally and nationally on the issue of second hand smoke are concerns that must be addressed."

The jail officials then filed a Motion for Summary Judgment on the issue of injunctive relief on March 5, 1996. On June 18, 1996, Judge Kopf granted Weaver an award of attorney fees, which was unsuccessfully appealed to the U. S. Court of Appeals for the Eighth Circuit by the jail officials. They have continued their challenge to that ruling by petitioning the United States Supreme Court for certiorari on the issue of the PLRA.

On April 26, 1996, the Prison Litigation Reform Act was signed into law. (Appendix H, App. 68-69). The pertinent portions of the PLRA do not prescribe the award of an attorney fee to Weaver even if they were to be applied retroactively. Since it is not retroactive in application, the PLRA has no effect on the award of an attorney fee to Weaver under 42 USC § 1988. This Petition for Certiorari should be denied.

ARGUMENT

A. ATTORNEY FEES CAN BE AWARDED TO THE PREVAILING PARTY AGAINST THE STATE OF NEBRASKA PURSUANT TO 42 USC § 1988.

The Petitioners' argument that section 1988 contains no unmistakably clear language abrogating sovereign immunity was made and rejected in Missouri v. Jenkins, 491 U.S. 274(1989). This court has held in Jenkins that application of section 1988 to the States did not depend on congressional application of the States' immunity. Attorney fees are part of costs, and costs are traditionally awarded without regard for the States' Eleventh Amendment Immunity. Hutto v. Finney 437 U.S. 678 at 695 (1978).

This argument by Petitioners was raised at the District Court level and at the Eighth Circuit, where it was rejected both times, citing Jensen v. Clarke, Hutto, and Jenkins. It should be rejected as well by this Court.

B. THE EIGHTH CIRCUIT'S OPINION IN THIS CASE IS NOT IN CONFLICT WITH LANDGRAF v. USI FILM PRODUCTS AND BRADLEY v. RICHMOND SCHOOL BOARD.

The Eighth Circuit Court's decision in this case is not in conflict with this Court's holdings in Landgraf and Bradley. The Petitioners argue that the three tests of Landgraf have not been met, and that the attorney's fee provision of the PLRA should be applied to all cases pending when the Act was passed. (Petition for Certiorari; 8) In Landgraf v. USI Film Products, 511 U.S.244, 114 S.Ct.1483(1994), this Court stated that where the statute does

not contain an express effective date, courts must determine three things in evaluating the retroactive application of the statute: whether the requirements impair previously held rights; whether there is increased liability for past conduct; and whether there are any new duties imposed with respect to transactions already completed. Landgraf, 114 S. Ct. at 1505. If so, the "traditional presumption" against retroactivity precludes application "absent clear congressional intent favoring such a result." IBID. Utilizing the three tests of Landgraf, the attorney's fee provisions of the PLRA should not be applied retroactively.

(1) Whether PLRA impairs previously held rights.

Prior to enactment of the attorney's fees provision of the PLRA, the court, in its discretion, could allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs. 42 U.S.C. § 1988(b).

Weaver is a prevailing party as that term is defined for purposes of section 1988. The lawsuit of Weaver was a necessary and important factor in achieving the smoking ban and the implementation of the ban by the jail officials was not gratuitous or voluntary. It is clear that the jail officials implemented the smoke free policy in response to Magistrate Piester's memorandum order of January 29, 1996. (Appendix E), and that therefore, Weaver is a prevailing party. Hendrickson v. Branstad, 934 F.2d158, (8thCir.1991); Parham v. Southwestern Bell Tel. Co., 433 F.2d421(8th Cir., 1970).

Weaver and his attorney have proceeded throughout this litigation with expectation derived from judicial precedent that if

they prevailed, they would be compensated. At the time Weaver asked for a preliminary injunction on January 18-19, 1996, and on February 12, 1996 when the jail officials responded by banning tobacco smoke in the Nebraska prisons, Weaver had a right to an attorney's fee if he was determined later to be a "prevailing party". For the Petitioners to argue that the PLRA abrogates that right to an attorney's fee acknowledges that the PLRA impairs a previously held right, and therefore, the PLRA should not be applied retroactively.

(2) Whether the PLRA increases liability for past conduct.

The attorney's fee provisions of the PLRA cause no increase on the liability of the Petitioners for past conduct, only a decrease, so this is not a factor.

If the PLRA limits the award of an attorney's fee to Weaver, the law would certainly increase Weaver's financial obligation to his attorney for legal services and costs associated with the long and expensive litigation. Since the attorney is ethically prohibited from paying costs to advance a litigated action, that obligation remains with the party. If the PLRA serves to limit Weaver's opportunity to be reimbursed for legal fees and expenses, its retroactive application should not be allowed because it increases his obligation for past conduct. The past conduct is the service rendered by Weaver's lawyer prior to the passage of the PLRA. See Cooper and Davis v. Casey, 97 F.3d 914 (7th Cir., 1996).

(3) Whether the PLRA imposes new duties with respect to transactions already completed.

Petitioners have no new duties with respect to past conduct as

a result of the PLRA.

Weaver, however, has an increased obligation to his attorney if his right to receive an attorney's fee is eliminated by the PLRA. Otherwise, the PLRA imposes no new duty on Weaver with respect to past transactions.

There is no inconsistency between the Eighth Circuit's ruling in Weaver and this Court's ruling in Landgraf. The first inquiry in Landgraf is whether there is an express statement in the law concerning effective date. Section 803, the pertinent attorney's fee section, is silent on retroactive effect. Section 802, that part of the PLRA that deals with prospective relief, specifically includes language detailing retroactive effect. Congress intentionally made section 802 retroactive, but chose not to make the attorney's fee section retroactive.

Of the three tests in Landgraf, the first one ("impairment of a right possessed by a party when he acted") is answered in the affirmative. Therefore, the traditional presumption against retroactivity applies.

The Petitioners further argue that the holding of Bradley v. Richmond School Board, 416 U.S. 696 (1974) is applicable to this case in that the award (or denial) of attorney's fees is collateral to the main cause of action and separable from the cause of action to be proved at trial. The statute, they argue, does not impose an additional or unforeseeable obligation upon the Petitioners. Bradley is inapplicable to this case. As the Eighth Circuit Court in Jensen v. Clarke, 94 F.3d 1191 (8th Cir.,1996) indicated, there are two distinctions with Bradley. First, in Bradley, there was no

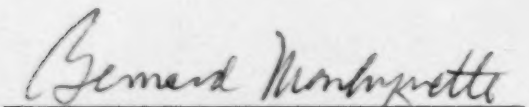
manifest injustice in allowing the school desegregation fee statute to apply because the lower courts had already awarded fees in the desegregation case on general equitable principles. Given the availability of fees under an alternative theory, the new fee statute did not impose an "unforeseeable obligation" on the school board. Bradley, 416 U.S. at 721. In Bradley, being ordered to pay attorney's fees was no great surprise, even though the legal theory under which those fees were to be imposed changed. Conversely, Weaver and his attorney have proceeded from the onset under the assumption that section 1988 would apply to his case. The PLRA did not become law until after all the activity of Weaver's case had taken place, and just before the District Court Judge ruled on the application for attorney fees. It would be "manifestly unjust" to upset those reasonable expectations and impose new guidelines at this late date in the Weaver case.

Secondly, there is evidence of congressional intent contrary to retroactive application of the attorney's fee portion of the PLRA. Congress made section 802 clearly retroactive, but did not make section 803 (attorney fee provisions) retroactive. Congress saw fit to state which section was to be retroactive, and it is not the attorney fee section. The exclusion of section 803 and its attorney's fee provisions from that clear statement is inconsistent with the Petitioners' argument for retroactivity. Bradley does not support the Petitioners' argument for retroactivity.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,



Bernard J. Monbouquette
Attorney for Respondent
3610 Dodge Street, Suite 220
Omaha, Nebraska 68131
(402) 346-1490

Dated: December 23, 1997